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# WAGING THE WRONG WAR: DRUG WAR STRATEGY AND ISSUES

A GROUP STUDY PROJECT

by

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# PART I

## INTRODUCTION

The United States is currently facing a social problem of epidemic proportion--the importation, sale, and use of illicit drugs. Our nation, with only five percent of the world's population, consumes sixty percent of the world's illegal drugs.[1] Expressed in economic terms, the U.S. drug market alone "is valued at an estimated $150 billion a year," more than twice the U.S. Army's annual budget.[2]

Illegal drug use in the United States has spawned domestic and international legal, social and economic problems of such staggering proportions that no citizen's life is left untouched in some way by this tragic phenomenon. As stated by President Bush, "the scourge of illegal drugs saps our vitality as a free people, diverts our energies from more positive pursuits and threatens friendly democratic governments now plagued by drug traffickers."[3]

The issue of illegal drugs, although relatively new to the agenda of national security issues, holds promise of being the most devastating issue the nation has faced. It combines the causes and results of domestic issues such as crime, poverty, worker productivity and health with international issues such as sovereignty of nations, economic development, human rights and the spread of democratic values.

Recognizing the magnitude of the problem, President Reagan declared a "war on drugs", that, not surprisingly, brought increased attention to the military element of power as a means of support to the anti-drug effort. Under President Bush's

leadership, the armed forces' role in counternarcotics operations has continued to expand.[4]

If the military is to be successful in supporting the counternarcotics efforts, it must have the resources, or means, to achieve its assigned missions. Two significant resources, among many, are the armed forces' intelligence and law enforcement capabilities. These two resources are affected by a myriad of laws which both hamper and facilitate their effectiveness.

The purpose of this study is to provide the reader with a view of the U.S. military's involvement in counternarcotics operations from the perspective of three different, but interrelated, functional areas. These three functional areas, Judge Advocate, Military Intelligence, and Military Police, were chosen because of their functional similarity to the major civilian "players" in the "drug war"--the Department of Justice, the national intelligence community, and national and local law enforcement.

Ensuing parts of this paper will discuss the historical background of the military's involvement in counternarcotics operations; intelligence support to the drug war's "supply side" strategy, focusing on issues preventing success; Military Police roles in halting illicit drug activity; and the overarching influence of various laws and legal opinions on the drug war and their effect on intelligence and law enforcement efforts. In conclusion, the authors will make recommendations for future changes, not only to the drug strategy, but in its implementation as well.

## PART II

## HISTORICAL BACKGROUND

While the armed forces have been used for a decade to support the "war on drugs," mostly as a supplier of equipment and technicians to service it, the genesis of large scale military involvement lies in the National Defense Authorization Act, Fiscal Year 1989.[5] House and Senate defense spending bills were significantly different, but after conference, it was agreed "that the Department of Defense (DOD) can and should play a major role in the national drug interdiction effort."[6]

Emphasizing that "intelligence is the key to a successful drug interdiction program," Congress directed the Secretary of Defense to provide civilian law enforcement agencies with information related to drug interdiction in a prompt manner, and, in conjunction with the Director of Central Intelligence, to make drug interdiction information a high priority for the intelligence community.[7]

Congress then established DoD as "the single lead agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States, . . . a role that is consistent with the traditional military mission."[8] It was the intent of Congress that by assuming the lead in this arena, the military would eliminate duplication of effort by civilian law enforcement agencies (CLEA), allowing the latter to focus on the activities for which they are best suited.[9]

After noting that this increased involvement of the military in the "war on drugs" was not a panacea, and lamenting that little was being done to support the demand reduction aspect of the national drug strategy,[10] Congress then required the President to report on a plan for DoD integration of "command, control, communications, and technical intelligence assets dedicated to drug interdiction into an effective network."[11] It also called for a report on the expanded use of the National Guard along borders and ports of entry.[12]

To aid CLEAs in their drug interdiction efforts, Congress strengthened laws that had previously codified judicial interpretations of the Posse Comitatus Act,[13] thus providing the military with expanded opportunities to **assist** CLEA activities.[14] These statutes will be discussed fully in a following part of this study.

A fair reading of Congressional action shows that in September 1988, our national legislature perceived that the strategy to reduce drug abuse (the end) had two prongs (ways)--demand reduction and supply abatement; that not enough attention was being paid to demand reduction; and that the military would play an expanding role in the anti-drug movement, sometimes taking the lead, as in aerial detection, and sometimes in support, as in loaning equipment and personnel to operate it to CLEAs. Moreover, the requirements for reports, studies, and information showed a Congressional interest in further expanding the military's role in the "war on drugs."

On September 18, 1989, prior to final passage of the National Defense Authorization Act for Fiscal Year 1990 and 1991, Secretary of Defense Cheney issued his guidance for implementation of the President's National Drug Control Strategy, issued thirteen days earlier. As reflected in the joint House-Senate Conference Report, prior to passage of the FY 90-91 Defense Authorization Act, Congress was not happy with the effort the armed forces had exerted in its supply abatement mission.[15]

At the time of Secretary Cheney's memorandum, Congress had given DoD one, and arguably three, strategic missions a year earlier. For certain, DoD was the lead agency for the aerial and maritime **detection** and **monitoring** of illegal drugs flowing into the U.S. Arguably, DoD had also been given concurrent missions of **integrating** command, control, communications, and intelligence assets dedicated to drug interdiction into an effective network, and, within the parameters of federal law, **expanding assistance** to National Guard units performing drug detection and interdiction duties.

Whether Secretary Cheney's memorandum improperly went beyond the Congressional mandate of military involvement in the "war on drugs," or merely expanded on President Bush's national strategy to combat drug abuse can be debated. What is clear is that Secretary Cheney's memorandum changed the military's purported role from that of one supporting CLEAs to one that "will help lead the attack on the supply of illegal drugs from abroad."[16] A close reading of the memorandum shows that Secretary Cheney was attempting to emphasize

sound low intensity conflict principles, particularly in his multi-national and multi-agency approach to supply reduction. While it is unfair to accuse the Secretary of completely changing the strategy to combat drugs (his memorandum addressed demand reduction also), his enhanced role for the armed forces created a sub-strategy, making eradication of drug supplies his end, and the military the primary means to achieve this goal. Unlike either President Reagan, who declared the "war", or the Congress, which was funding it, Secretary Cheney was prepared to fight the supply abatement aspect of the "war."

In short, Secretary Cheney envisioned attacking drugs at the source using such tools as nation-building (security assistance), operational support to host nation forces, and intelligence assets to defeat the export of drugs. To combat drugs in transit, the second line of defense against drug introduction into the U.S., the Secretary announced that the military would interdict (as well as monitor, as ordered by Congress) illicit drugs and deploy forces to complement federal CLEAs and to assist foreign governments. To attack drugs in the U.S., Secretary Cheney announced the potential detail of personnel and equipment to CLEAs, and DoD's desire to assist the Department of Justice with the incarceration and rehabilitation of drug criminals.

Approximately two months after Secretary Cheney's memorandum was published, Congress acted. First, it clarified the military's role as the single lead agency for detecting and monitoring the aerial and maritime flow of illegal drugs into the U.S. Congress

made it abundantly clear that such was a military mission, essential to the nation's defense, and it would not be shirked by passing it off as a CLEA mission, the support of which would adversely affect military preparedness.[17] The legislation, inter alia, also required the Secretary of Defense to continue integrating the command, control, communications, and technical intelligence assets into an effective network and to conduct both active duty and reserve training exercises in drug interdiction areas.

Proposals that would have amended and expanded the law to authorize military personnel to inspect cargo, vehicles, vessels, and aircraft at U.S. ports of entry, as well as compel airborne drug traffickers to comply with landing instructions were defeated.[18] Attempts to make DoD a "cost-free" support agency for CLEAs, and to waive Economy Act[19] reimbursement procedures were watered down and tied to DoD funding for counternarcotic operations.

While Congress did expand DoD involvement in the "war on drugs" incrementally, this expansion was clearly related to involvement in the latter two areas of Secretary Cheney's memorandum--attacking drugs in transit and in the U.S. By rejecting that portion of the House Bill (Section 1103) that would have involved the military in active participation of law enforcement functions, Congress seemed determined to prevent direct involvement by Title 10, U.S. Code, armed forces in any domestic law enforcement activities.[20]

On November 5, 1990, Congress again opened the door for increased military involvement in the anti-drug effort.[21] In some respects, this legislation can be denominated a "catch-up" bill, for it authorized to a large extent what Secretary Cheney directed DoD to accomplish in September 1989. First, the Bill increased funding for drug interdiction and counterdrug activities.[22] Henceforth, like the Secretary of Defense, Congress was to specify a more aggressive role, like interdiction, for the armed forces. Looking beyond U.S. shores, Congress directed a study to examine the need for and potential effectiveness of an over-the-horizon radar, directed toward Mexico, and authorized certain types of support for the counterdrug activities of any other department or agency of the Federal Government or of any state, local, or foreign law enforcement agency, when requested by the appropriate official.[23]

Adding increased importance to the role of the military, as well as removing any reluctance the armed forces might exhibit to performing its counterdrug mission at the expense of more traditional roles, Congress waived the provision of 10 U.S.C. 376[24] by allowing the Secretary of Defense to provide anti-drug support to federal, state, local, and foreign law enforcement agencies even if the support adversely affected military readiness in the short term, where the value of such support outweighed the short-term effects.[25] In consonance with this expanded role, the Secretary of Defense was permitted to execute valid training exercises or operations specifically designed to aid CLEAs.[26]

In its requirement for a report on the effectiveness of defense spending in the "war on drugs,"[27] and concern that undue assistance to the military in the Andean region might undermine the democratization process,[28] Congress acknowledged the disquieting trend of gradual military preeminence in an arena that had heretofore been the bailiwick of CLEAs. Nonetheless, with the passage of the FY1991 National Defense Authorization Act, Congress tacitly sanctioned all three prongs of Secretary Cheney's 1989 DoD program for the "war on drugs."

The Fiscal Year 1992 Defense Authorization Act continues in the same vein as its predecessors, increasing funds dedicated to drug interdiction-type activities. Surprisingly, funding for demand reduction was reduced, with the admonition that although important, DoD should support state (National Guard) plans to help reduce drug demand. Interdiction capabilities were further enhanced with funding for Mobile Inshore Underwater Warfare Vans, aerostate radar systems to help seal the county's southern border, and the HH-60J helicopter. Intelligence integration was emphasized when forty million dollars were specifically earmarked for the National Drug Intelligence Center (NDIC).[29]

As this brief historical perspective shows, no one person or body is dedicated to implementing the national drug reduction strategy. A lack of leadership at the national level continues to hamper the multi-agency, multi-national effort that is required to achieve the true strategic objective of the "war on drugs." The Office of National Drug Control Policy (ONDCP), which was "to bring

discipline to the sibling rivalry that characterizes the federal government's fight against drugs"[30] has failed. "The drug war is managed by committee and has no single individual charged with adequate authority (below the President). The 'drug czar' as the director of the ONDCP is called, is only as powerful as the Cabinet and Congress will allow."[31] The internecine fighting and resourcing battles among the 36 plus federal agencies involved in counter-narcotics operations severely hamper any unified effort.

Whatever may be said of a lack of vision, unity of effort, and coordinated leadership, or of a strategy that has given short shrift to the concept of demand reduction, the military's role in supply abatement continues unabated. As recent history shows, Congress apparently welcomes DoD leadership in areas beyond those monitoring, detecting, integrating, and supporting roles originally mandated. Perhaps the military should have an increasingly important role as law enforcement officials face a well-financed, ruthless international cartel of narcotraffickers who have demonstrated the capacity to undermine democratic institutions and corrupt governments that are U.S. friends and allies, and who have the potential to significantly disrupt U.S. global interests. Clearly, combatting the violence and coercion associated with drug trafficking and narcoterrorism fits the definition of low intensity conflict and is an appropriate role for the military.

In light of this historical perspective, the study will next focus on DoD's intelligence, legal, and law enforcement capabilities, and how each impacts on the national drug strategy.

## PART III

## INTELLIGENCE

The purpose of this part of the study project is to discuss intelligence support to the supply-side strategy of the federal government's "drug war." Part III will first discuss the supply side nature of the "war." It will then describe "drug intelligence" and the "drug intelligence community" in order to identify issues in categories of organizational structure, measures of success, and information management. The text will then shift to additional factors affecting achievement of the President's National Drug Control Strategy. Issues that relate to legal and law enforcement constraints and procedures will be mentioned as they impact the effectiveness of intelligence to support the objectives of the "drug war" campaigns. The goal of this section is to provide an insight and perspective which might enable the reader to better understand the dilemma confronting the military, and particularly military intelligence, in its "drug war" support and operational roles.

Final success in achieving America's goal in the "drug war" continues to be unattainable. Despite years of effort, the creation of complex bureaucratic interagency architectures, and the expenditure of billions of increasingly scarce taxpayer dollars, "the same number of people use cocaine weekly as they did in 1989" according to the National Institute on Drug Abuse.[32] Newsweek, reporting on State and Defense Department evaluations and on Congressional concern reflects the reality that:

> American efforts are plagued by poor management, policy confusion and faulty intelligence. The "drug war" may also be doing lasting damage to the unstable politics of America's Latin allies. And where it counts most--on the streets--the impact, if any, of the military's anti-drug effort is impossible to discern.[33]

Newsweek's article, written in January 1992, is an accurate reflection of America's historical lack of success with the "drug war." Its conclusions are essentially no different than reports, reflecting the nation's frustration with failure, written during the past decade.

The reasons for this unfortunate international, national, local and personal failure are complex. They relate to military intelligence, as a key participant in the "drug war," as well as to larger issues that reflect fundamental organizational, policy and strategic faults in the entire National Drug Control Program.

## "SUPPLY SIDE" ENGAGEMENT

It is important to understand several political and strategic dynamics of the drug problem to put into perspective the participation, effort and success of military intelligence in achieving the "drug war's" goals. Why do we have a "drug war" at all? What is the implication for the military? Where is this characterization of America's drug problem taking us in terms of meeting the goal of a drug "free" America?

The label of "drug war" is closely associated with the concept that drugs pose a threat to the national security of the country.

President Reagan's 1986 National Security Decision Directive stated that "national security was being undermined by drug use and its associated health, economic, political and social consequences."[34] This characterization was reinforced by Congressmen Aspin and Nichols in June, 1988 in statements to the Congressional Research Service as they prepared their report on "Narcotics Interdiction and Use of the Military: Issues to Congress" and was expanded to include the "corruptive and destabilizing effects upon the producing and trafficking nations."[35]

Despite the great effort to label the problem as a "drug war," the genesis of the problem has always boiled down to the U.S. citizens' huge appetite for illegal drugs. Political calls for military action, increases in "drug war" spending, tougher laws and certification of Latin American countries as supportive in the "drug war" may show the seriousness with which the political leadership views the problem, but that does not change the nature of a social problem nor require a "declaration of war" to resolve it. However, what this characterization **does** fuel is an emphasis on the "supply side" (external threat) versus the "demand side" (domestic social problem) of the problem. Because the problem is defined as a threat to the national security of the U.S., military participation is not only expected, but demanded by law and national policy.

The second major factor which locks the military into the "drug war's" supply side battle is the traditional legal restriction against using military personnel and intelligence

collection systems within the borders of the United States against U.S. citizens. A host of laws and other restrictions, which will be discussed later in this study, prevent the military from actively performing "drug war" missions inside the nation. Consequently, the active duty military's energies are focused towards the "supply side" of the "war."

"Supply side" missions focus on the attack on drugs at the source (production and processing in drug trafficking countries) and in transit (interdiction). Specific supply reduction goals, as stated in the President's 1991 National Drug Control Strategy, include dismantling the trafficking organizations themselves by identification and elimination of the key leaders, communication means, transportation structures, finance systems, supply sources and production facilities.[36] It is obvious that to achieve success in any or all of these tasks, responsive, focused, tailored and integrated intelligence is absolutely essential. This requirement for intelligence and issues that need resolution to better provide intelligence to separate agencies and the overall drug intelligence community form a key element of the President's 1991 National Drug Control Strategy.

Intelligence has two primary roles in the "drug war's" "supply side" campaigns. First, intelligence supports the Department of Defense mission as the lead agency for the detection and monitoring of air and maritime drug traffic for civilian law enforcement agency (CLEA), U.S. Customs and Coast Guard drug trafficking interdiction. Second, intelligence supports U.S. military

assistance efforts to help host nations eliminate illicit drug production, processing and trafficking organizations. While the detection and monitoring mission is system intensive (i.e. airborne radar surveillance systems) and the host nation mission is personnel intensive (i.e. intelligence training, analysis, production), both of these roles require the full range and application of intelligence tactics, techniques and procedures to support the need for tactical and operational drug intelligence.

## "DRUG INTELLIGENCE and the DRUG INTELLIGENCE COMMUNITY"

The discussion will now present a description of "drug intelligence" and the "drug intelligence community" to assist in identifying organizational and information management issues that exist among the key players in the "drug war": both Department of Defense, other federal departments and CLEAs.

Drug intelligence consists of processed information concerning "(1) drug trafficking and abuse patterns and trends, including geographic areas involved and types of smuggling activities; (2) anticipated drug-related criminal acts so that CLEAs can take action; (3) specific individuals and organizations responsible for importing and distributing illegal drugs, the extent of their criminal activity, and details on drug trafficking organizations."[37] This drug intelligence is categorized into one of three areas; strategic, tactical or operational. The relative category of intelligence provided to a requestor or user; strategic, tactical

or operational, depends upon the mission of the user.

Strategic level drug intelligence is produced from information that would be of use to policy makers and agencies concerned with broad patterns and trends dealing with the production, transfer and use of drugs. For example, Congressional committees or the State Department may need to see broad patterns of supply to be able to plan future security assistance programs. Tactical drug intelligence is processed information used primarily by CLEAs for near term actions. Examples include the detection and monitoring of suspect aircraft or water vessels which leads to the interdiction and immediate arrest of drug traffickers and the seizure of drug shipments. In military terms, tactical drug intelligence equates to combat information. The third category of drug intelligence comes somewhere in between the other two. Operational drug intelligence provides support to agencies involved in longer term operations which require detailed planning and closely coordinated execution. Examples of operational intelligence include studies of key trafficking organization leaders, movement studies of precursor chemicals to lab sites, imagery analysis and interpretation to detect and monitor activity of new airfields. Operational intelligence supports operations such as lab site raids, investigations and prosecutions.

The intelligence systems available to support the collection of information to produce the three categories of intelligence include all the capabilities in the inventory of the nation. Depending upon the situation, a tactical requirement for

intelligence might be satisfied by the most sophisticated space imagery system down to the most basic night vision device. The determining factor is not the category of intelligence required, but the capability and availability of the system and the ability of intelligence analysts to process the information for use by the "drug intelligence community."

The "drug intelligence community" consists of a group of federal agencies that conduct, or contribute to intelligence operations that are planned and executed to collect, analyze, and process information to support a user's requirements. The following description illustrates the multi-agency nature of the intelligence architecture:

Drug Enforcement Administration's Office of Intelligence provides intelligence analysis support to DEA enforcement operations. It's principal focus is to meet DEA requirements for DEA investigative and enforcement operations. DEA intelligence is informant/HUMINT intensive.

Federal Bureau of Investigation Drug Intelligence Unit provides intelligence analysis support to FBI investigative operations. It's principle focus is to meet FBI requirements. FBI intelligence is informant/HUMINT intensive.

Central Intelligence Agency Counternarcotics Center provides "all source" intelligence analysis and production for the intelligence community. Legal constraints and restrictions, both statutory and Executive Order, prevent sharing, access and distribution to all agencies involved in "drug war" operations.

Department of the Treasury Financial Crimes Enforcement Network (FinCen) provides information and analysis of financial criminal activities to CLEAs.

El Paso Intelligence Center (EPIC) is a DEA activity that provides direct information on the tactical level that aids CLEAs in their tactical mission of arrests and illicit drug seizures. EPIC does not have a mission to be an integrating center nor an "all source" analysis agency.

Customs Service, the Coast Guard and other agency internal intelligence efforts provide support to their specific mission area. They parallel and complement the EPIC mission. They do not conduct intelligence "all source" analysis or production nor do they support above the tactical level.

Department of Defense provides intelligence support to the entire "drug war" community consistent with legal and Executive Order constraints and restrictions. DOD conducts "all source" collection, analysis and production at all levels (National, Unified Command, Joint Task Force and host nation "country team").[38]

The description of the "drug war" intelligence community introduces the first issue to discuss. This issue addresses the difference between the military intelligence system and the combination of federal agencies that implement and execute counternarcotic programs, the "drug war intelligence community."

Unlike the multi-agency "drug intelligence community," the military intelligence system consists of an echeloned set of individuals and organizations (means), oriented towards a common

end, working within an accepted and understood framework process (ways, i.e. the intelligence cycle). The structure of the intelligence system consists of directors, coordinators, producers and executors. Directors (military commanders) are the persons who generate the requirements that must be satisfied. Their requirements move the system into action. They are the consumers of intelligence production. Coordinators (G-2s) respond to the directors and in turn direct and control the efforts and operations of the rest of the intelligence system. They break down the director's needs into specific intelligence requirements. Coordinators manage collection and analysis of information and the dissemination of the intelligence product. Producers support the coordinators. They perform the management of collection resources, do the processing of information and the dissemination of intelligence. The executors deploy, maintain, train and sustain the elements and assets that collect information.

Two key points deserve emphasis. The first point is the role of the director. The director is the person who states and defines the vision, intent and focus of the organization. The director's intent shows the relationship between the objective, the mission at hand and the intelligence efforts required. The director relates the means and ways to the ends desired. In summary, one person is in charge. The second key point to emphasize is that the rest of the intelligence system responds to requirements of the director. This allows the system to apply resources against the requirements

in order of priority as needed to accomplish the organization's mission.

In contrast, let us examine the "drug intelligence community" in its effort to meet intelligence requirements. The major players, as discussed above, are the Justice Department with the FBI and DEA, the State Department and its country teams, the Transportation Department and the U.S. Coast Guard, the Treasury Department and Customs Service, CIA, and the Department of Defense. In total, some 36 federal civil agencies are involved in the "drug war."[39]

Within this "intelligence community" there is no "director." There is no single person, vested with the required authority and responsibility, in charge of the overall effort. Each participating agency head provides the focus to his organization's effort as required to achieve success for that organization. While each participant may have a contribution to make to the overall intelligence effort, it is neither managed nor coordinated across organizational boundaries. The "drug war" intelligence system is not focused and guided by a single intent designed towards achieving a shared objective. The multi-agency nature of the intelligence effort, with no one in charge, ensures diversity of ways, means, and ends. The result for intelligence, as a primary element of the "drug war" effort, is less focused, timely, integrated and effective support. This fundamental problem is reflected in the President's National Drug Control Strategy which states we must "enhance the integration of organizational

structures to collect, digest and apply the large volume of relevant information concerning drug trafficking organizations."[40]

The discussion of the organizational differences between the military intelligence structure and the multi-agency "drug war" intelligence system introduces a related issue affecting the success of the overall "drug war" effort. This issue involves the attempt to measure or evaluate (and eventually compare) the success among agencies in the "drug war" community that are working towards different "ends." Law Enforcement Agencies (LEAs), the Customs Service and the U.S. Coast Guard, for example, are oriented towards a "tactical objective," the seizure of drugs and the arrest of traffickers. The more arrests and tons of drugs seized, the better their success. Meanwhile, organizations like U.S. Southern Command, individual "country teams" and DEA are oriented towards elimination of production, processing and trafficking organizational infrastructures and capabilities, an "operational objective." The more labs identified and precursor chemicals destroyed, the better their success. Unfortunately, this simple division of mission orientation (different ends) has led to a kind of "body count" mentality among the agencies themselves and has crept into the policy and Congressional levels where resource and budget allocation decisions are made.

What this issue boils down to is that the dynamics of competition between agencies make it less likely that agencies will work openly and freely together. For the CLEAs particularly, there is an institutional bias inherent in the system which provides an

incentive for not contributing to the strategic "drug war" goal of demand reduction.[41] An agency with a mission of interdicting drug shipments is reluctant to provide information to another agency that would eliminate drug shipments to be seized. As a result, information sharing and comprehensive intelligence support suffers. National leaders contribute to this situation by reinforcing an agency's success, or lack of it, by increases or decreases in the agency's share of the "drug war" budget. This is probably the primary reason law enforcement agencies have a record of independent action and autonomous orientation.

An issue that further prevents the building of a cohesive team effort among different agencies is the controversy over the "use" of information. Intelligence elements use information to build intelligence products. LEAs use information as courtroom evidence to prosecute drug traffickers.

Confidentiality, to include information sources and methods of information collection, is a fundamental principle of intelligence operations. Intelligence activities ensure confidentiality by relying on limiting access to information through the use of appropriate security classification levels and compartmentation. Without such protection intelligence activities cannot build information sources and maintain a continuing flow of information to generate intelligence products to meet the needs of intelligence consumers. Law enforcement elements, on the other hand, forced to work within judicial and legal procedural boundaries, must present information sources as evidence in the legal system's "publicly

open" prosecution process. In many cases these are the very information sources the intelligence elements are working so hard to protect. For the intelligence community this is a dangerous compromise of sources that destroys the possibility of continuing availability of information in the short term and, more seriously, it is an action that can have long term consequences by putting intelligence methods at risk of exposure. While legal policy and judicial procedures attempt to accommodate this dilemma of confidentiality of source versus the need for evidence, constitutional requirements will continue to hinder true cohesiveness of "drug war" efforts, as the legal portion of this study shows.

## INFORMATION MANAGEMENT

The discussion to this point has looked at the differences between a military intelligence system and the multi-agency nature of the "drug war" intelligence effort in order to show contrasts in orientation and effectiveness. The discussion will now turn to another key element of the intelligence system, information management. Information management poses many challenges to the requirement to manage information in such a fashion that it effectively supports "drug war" efforts.

Information management (to include storage and shared access), intelligence production, integration and dissemination are central goals of the 1991 National Drug Control Strategy and a major task

for the Department of Defense. The scope of this task is especially broad considering that "currently, a multitude of civilian and intelligence agencies and Department of Defense components operate over 100 drug control information centers."[42] Information management and associated communications and data processing is the backbone of the "drug war" intelligence effort. It is even more critical because of the multi-agency character of the "drug war" effort as previously discussed. With diverse and institutionally competing missions and the wide range of intelligence collection means available (from informants to national technical intelligence collection systems), information and intelligence sharing is one area with the potential to bring unity of effort into the "drug war." However, that "unity of effort" is still a long way off.

The May 1991, General Accounting Office (GAO) report on the "drug war's" information management challenges addressed several central issues affecting intelligence.[43] First, central Information Resource Management (IRM) leadership is needed. GAO notes that because the agencies involved do have varying degrees of independence, strong leadership in information management will assist in guiding the agencies (both CLEA and DOD) towards actions to achieve overall National Drug Control Strategy goals as well as contributing to interoperability between agencies.[44]

Second, the accuracy and reliability of data used to support the "drug war" community must be ensured. Without this guarantee operations are not only doomed to failure and CLEA and legal

resources wasted, but the entire program loses credibility and the confidence of the public and host nation partners. Currently, quality of information cannot be ensured across agency boundaries. This makes agencies more reluctant to act on information obtained outside the agency itself. Other problems also exist. For example, the Privacy Act's disclosure requirements place practical restrictions on the information an agency will obtain, store and share concerning individuals. This adds an additional impediment to the sharing of information between agencies.

A third issue involves the requirement to secure classified and highly sensitive information. This is an especially complex challenge because of the extensive and increasingly important use of automation support to information management. As the GAO report stated, as recently as "last year, we found the Department of Justice was not protecting its highly sensitive computer systems."[45] It is apparent, at least to the GAO, that if an agency is not securing its own information and information systems, it is not likely that effective safeguards have been or are being established between agencies tasked to share information. The result of this problem is that agencies will not risk their information to a computer network which may not be secure. This means information flow often slows down to the pace of a telephone call, if it flows at all. Agencies, already under pressure to correct weak operational security practices, do not want to take the chance their information might be accessed by unauthorized people. Another side of this same problem deals with the highly classified

and restricted access nature of DOD national foreign intelligence. This presents an additional and time consuming requirement to sanitize information before general access can be provided to members of other agencies.

The final issue the GAO reported is the proliferation of intelligence centers within the "drug war intelligence community." This proliferation further complicates the already difficult task of information management. Not only does it make the information management architecture more complex, but also much more expensive.[46]

Although the GAO report on information management did not address, as a central information management issue, the independent nature of the agencies fighting the "drug war," this situation does impact on the cost and effectiveness of improving information management. Simply put, having no one in charge means duplication of information management systems that do not interoperate, cost more, lack quality standardization, pose security risks, and decrease the potential for high speed information sharing and analysis. It was essentially with these problems in mind that the President's "National Drug Control Strategy" and Congress identified the requirement for a National Drug Intelligence Center (NDIC). NDIC, it is envisioned, will help resolve several issues discussed and will contribute to better CLEA and DOD intelligence coordination and integration. Unfortunately, NDIC is not yet operational because of arguments over roles, missions and resource/budget responsibilities.[47]

## PERFORMANCE EVALUATION

The text will now transition from a focus towards organizational and information management issues to a discussion of factors relating to success in the two major campaigns of the supply-side "drug war": interdiction/deterrence and international programs aimed at drug producer countries.

The evaluation of the effectiveness of intelligence support to interdiction is a product of the success of the tactical and operational users (CLEAs and other agencies) and is reflected in their statistical records of achievement. These statistics, over time, show an increasing number of arrests and seizures. "For example, key drug criminals once thought invincible are being brought to justice. Progress is also being made in restricting the flow of drugs, drug money, weapons and essential chemicals necessary to sustain illegal drug enterprises."[48] Department of Defense officials report that efforts have led to successes not only against individual drug shipments but also have had a "deterrent" effect against drug production and trafficking operations.[49] However, despite the growing effectiveness of intelligence in supporting the tactical and operational missions of the "drug war," its impact on the national goal of reduced cocaine supplies has been negligible. The estimated volume of drugs feeding the demand did not decrease in 1990, even with the increased intelligence effort in support of supply reduction programs. In fact, it increased.[50] This situation is a classic

example of winning at the tactical level but losing the war. Successful interdiction campaigns are not bringing the "drug war" to a victorious conclusion.

International programs implemented to stop the flow of drugs at the source have an equally discouraging record of success. For example, the U.S. has developed and implemented major programs, under the auspices of the President's Andean Strategy, to assist the Latin nations of Columbia, Bolivia, Peru and others in destroying sources of drug supply. Intelligence has focused these efforts and has contributed to many tactical and operational successes against the production and trafficking organizations. However, despite statistics reflecting increased levels of crops eradicated, labs destroyed and organizations neutralized, the supply of drugs has not decreased.

While the net results of the "supply side" effort are discouraging, some programs, as mentioned above, have made an impact. For example, USSOUTHCOM, in conjunction with the Defense Intelligence Agency and the Country Teams of several Andean countries, has made a special effort to provide tailored intelligence support to the host country's counternarcotic activities. This program's support centers around an element called the Tactical Analysis Team (TAT), which is a team of U.S. intelligence personnel stationed with the U.S. Embassy's Country Team to facilitate availability of U.S. produced "all-source" intelligence based on the particular need of the host country. The team also provides the expertise to formulate intelligence

requests, interface with other intelligence agencies and perform required intelligence analysis on site. These teams have had a positive impact on improving the quality and timeliness of intelligence to support both counternarcotic planning and operations. While the end result of the "drug war" has not dramatically changed, successful programs, like the example above, add a bit of effectivenss to the "supply side" effort.

The discussion for this part will conclude with an analysis of factors preventing a"drug war" victory. Grant Wardlaw does an outstanding job of explaining why it is impossible to win the strategic "drug war" battle in his report on "Intelligence and the International Narcotics Problem."[51] This explanation goes to the heart of why the "drug war's" supply side emphasis is a futile effort.

First, the immense size of the trade in terms of countries and amounts involved, combined with the flexibility of sources and locations of supply and production, make it impossible to be everywhere at once to disrupt, arrest or seize the persons responsible or drugs produced.

Second, simple economics makes the effort worthwhile. Interdiction losses are inconsequential compared to the huge profits involved. The drug trafficker cannot lose. As long as demand remains, the price will vary according to availability, ensuring profits to the criminal. For the grower, the incentive is as strong. Coca brings a higher price than any legal substitute.

Third, the flexibility of smuggling methods and routes gives

the initiative to the trafficker. Interdiction efforts just are not able to adapt as fast as the trafficker can modify his operations. In fact, the estimate is that doubling the interdiction rate (at additional immense cost for the taxpayer) would only raise the retail price of cocaine by six percent.[52]

Finally, additional dynamics of the problem relate to the social, political and economic self-interests of the host countries themselves. While these countries sympathize with the problem America has with its appetite for drugs, they simply have bigger problems of their own to solve. They are faced with everything from the negative effects of crop substitution on the incomes of rural farmers and the sovereignty issues of foreign powers dictating domestic policy, to the popularity of drug leaders supplying jobs and basic social services that are not available from the government to the people. Until the national and international environment changes radically, the flow of drugs will continue from these under-developed, under-nourished, under-resourced countries.

In the final analysis intelligence support and interdiction, while having a deterrent effect, have not and will not achieve national "drug war" strategic goals of dismantling the trafficking organizations and eliminating the supply of illegal drugs. The United States needs to relook the entire national drug control strategy and refocus efforts and resources accordingly. This will entail a basic shift from "supply-side" tactics to a direct assault closer to the true "center of gravity" of the "drug war"--DEMAND.

# PART IV

# LAW OF THE DRUG WAR

*The science of legislation is like that of medicine in one respect: that it is far more easy to point out what will do harm that what will do good.*

CHARLES CALEB COLTON

The purpose of this section is to analyze current laws and regulations that impact on the military's counternarcotics mission, apply these laws to the ways and means used by DoD to try to accomplish its objective, and where appropriate, suggest changes that may enhance the capability of the armed forces to stem the flow of illegal drugs. Secretary Cheney's September 18, 1989, memorandum, giving the armed forces three separate phases during which to attack drugs, will serve as the frame of reference for cataloging and analyzing the law.

## LEGAL IMPERATIVES

*Let all the laws be clear, uniform, and precise; to interpret laws is almost always to corrupt them.*

VOLTAIRE

To attack drugs at the source (the first line of defense) in ways envisioned by Secretary Cheney, the military must have the

authority to "wage the war" externally. All counternarcotics activities that take place in foreign countries (land area and territorial seas) must be sanctioned by the Secretary of State.[53] Accordingly, DoD authority is derivative. Although the Posse Comitatus Act, prescribing direct military involvement in law enforcement activities, does not apply outside the territorial limits of the U.S., DoD policy generally restricts direct operations by military personnel.[54] Nonetheless, when Department of Justice legal counsel concludes that FBI agents may arrest foreign nationals outside the U.S. and without the consent of the country in which the arrest/seizure is executed,[55] and the aforementioned DoD policy permits direct military assistance in this operation, the risk to armed forces personnel is high since that foreign country's sovereignty is, for all practical purposes, being invaded.

The Department of State provides counternarcotics assistance to foreign governments and international organizations combatting the trafficking of illicit drugs under the Foreign Assistance Act.[56] Since this International Narcotic Control program is incorporated in Subchapter I of the legislation, monies provided foreign governments under this authority are not considered "security assistance". The importance of this will be seen shortly. The Department of Defense provides support under both the narcotics control and security assistance portions of the Foreign Assistance Act.

In support of suppressing international narcotics trafficking, one of the most important U.S. foreign policy objectives, [57] the State Department may conclude agreements with foreign nations to "facilitate control of the production, processing, transportation, and distribution of . . . controlled substances,"[58] as well as fund the use of measures to eradicate drug crops.[59] The State Department can also transfer to foreign nations property seized or "forfeited to the U.S. Government in connection with narcotics-related activity,"[60] provided the foreign government concerned contributed to the seizure.[61] In many instances, DoD personnel participate in negotiating these agreements and support marijuana and coca eradication under the host country's Internal Defense and Development umbrella.

Subchapter I of the Foreign Assistance Act also provides for foreign developmental assistance,[62] in which DoD as a federal agency may participate. While developmental assistance, unlike security assistance, is designed for nonmilitary aid, defense articles and services, like aircraft and mechanics, can be provided as developmental assistance since this aid lies in Subchapter I of the Act, along with the International Narcotic Control program. Accordingly, defense articles and services can be transferred in accordance with State Department and CINC agreements[63] without having to face the legal restrictions imposed by security assistance legislation. This is especially meaningful since the State Department cannot use International Narcotic Control money "for the procurement of weapons or ammunition."[64]

The second major focus of the Foreign Assistance Act, as it applies to anti-drug efforts, is security assistance. "Security assistance involves 'the transfer of economic assistance through sale, grant, lease, or loan to friendly foreign governments.'"[65] The Foreign Military Financing Program,[66] Foreign Military Sales,[67] International Military Education and Training,[68] and Economic Support Fund[69] aspects of security assistance all aid, or have the potential to assist counternarcotic efforts. Interrelated with the Foreign Assistance Act is the Arms Export and Control Act.[70]

While security assistance makes a wide ranging contribution to counterdrug operations, there are numerous Congressional controls on its application.[71] Unless otherwise permitted by an existing Status of Forces Agreement, DoD personnel may not "directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law" (emphasis added).[72] Likewise, DoD personnel may not interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the consent of such person.[73] Exceptions in the law permit armed forces personnel to be present or assist foreign officers in making an arrest with the "approval of the United States chief of mission,"[74] and, with the foreign government's permission, to make arrests in the territorial sea of that country.[75] However, there is no such exception for DoD participation in interrogations. As pointed out in Part III of this study, such a prohibition can inhibit

information gathering and sharing among federal agencies charged with interdicting the flow of drugs in international commerce.

In terms of combatting drugs at the source, the foreign police training prohibitions found in Section 660 of the Foreign Assistance Act could hinder the strategy's effectiveness.[76] However, several exceptions,[77] specific waivers by Congress during the budget approval process, and the ability to use federal interagency transaction authority allow the U.S. latitude in training foreign personnel engaged in law enforcement activities.

An analysis of laws regulating armed forces conduct in the "war on drugs" abroad demonstrates that both the legislative and executive branches have loosened most bonds that tie the military's hands. Congress is rightly concerned that security assistance be provided to deserving countries and "not be obligated or expended to provide assistance to any country for the purpose of aiding the efforts of the government of such country to repress the legitimate rights of the population of such country contrary to the Universal Declaration of Human Rights."[78] There is sufficient flexibility in the law to permit the transfer of DoD goods and services, under the correct appropriation, to the right country.

Restrictions on the law enforcement related activities of DoD personnel are also warranted. The strictures on armed forces activity abroad are virtually the same as in the United States. Direct action to enforce the law is prohibited. Support to foreign, as well as federal LEAs, operating abroad is permissible.

If the Executive, or Congress, wants more active involvement by military personnel abroad, they need to reclassify the "war on drugs" as a counterinsurgency by narcoterrorist, right-wing cartels, bent on overthrowing a friendly, democratic government, or an operation to defeat Maoist insurgents, with the same objective, who feed off peasant coca producers, and with the support of the drug producing nations, commence military action totally under the principles of low intensity conflict. The rhetorical "war" is not eliminating drug production.

The second line of defense against enterprising transnational drug dealers focuses on interdiction. While the original Congressional mandate gave DoD the more mundane mission of monitoring and detecting the drug flow and integrating this information into an effective network dedicated to interdiction, the Defense Department's role has taken on added dimensions.

DoD personnel may operate equipment for federal CLEAs enforcing controlled substance laws, to include assisting state and local governments in their enforcement of similar statutes, provided there is federal CLEA involvement.[79] This permits support in the detection, monitoring, and communication of the movement of sea and air traffic, to include the interception and pursuit of vessels or aircraft detected outside the land area of the U.S. in order to direct that vessel or aircraft to a location designated by civilian officials. Additionally, Coast Guard personnel must be assigned aboard naval vessels in "drug interdiction areas" to perform law enforcement, drug interdiction missions.[80] This

authority, in effect, allows DoD personnel to operate in an environment where a hostile confrontation with suspected civilian drug traffickers can take place. By requiring a plane to land or a boat to dock at a certain location, DoD personnel are, for all practical purposes, effecting the arrest of that individual and seizure of his property, despite the general prohibition against these activities by armed forces personnel.[81]

As the legislative history shows and the preceding section of this study explains, intelligence gathering is the real crux of the Congressionally mandated mission, and of the three military roles delineated by Secretary Cheney, the one for which the armed forces is best suited. To support federal LEAs with international drug law enforcement responsibilities, DoD must consider the informational needs of these LEAs when planning exercises or training, and furnish any information gained "to the extent consistent with national security."[82] In essence, DoD supports, within its capabilities, the tactical and operational intelligence requirements of numerous CLEAs involved in counterdrug efforts, all with their competing agendas. Essential to any effective interdiction effort is a comprehensive analysis of the information gathered, and transmission of the data to the multitude of agencies that have varying levels of responsibility for seizing the drugs upon arrival in the U.S. including territorial waters.

All restrictions related to intelligence gathering are rooted in the Fourth Amendment to the Constitution.[83] A fair reading of Congressional action in the counternarcotics arena over the past

three years shows that the Congress has amended laws to involve the military in every aspect of law enforcement except in the Fourth Amendment's search and seizure area. Any modern technology, unobtrusive though it may be, that is used in surveillance and intelligence gathering will be put to the Constitutional test.

Equally significant is the Congressional and Executive prohibition against national foreign intelligence agencies (which includes the DoD counterintelligence apparatus) from collecting intelligence and maintaining files on U.S. persons.[84] This intelligence community can gather information on U.S. persons outside the U.S. if there is reasonable assurance that these individuals are, or are about to engage in illegal international narcotics activities.[85] The prohibition against maintaining files remains. Additionally, the counterintelligence community is enjoined from collecting information on persons **inside** the U.S. suspected of drug dealing.[86]

The repeal of the Hughes-Ryan amendment[87] by Congress in the Intelligence Authorization Act for Fiscal Year 1991[88] may provide some indirect assistance to this intelligence community, even though the 1974 law only "applied to covert actions undertaken by the CIA and was never strictly applied."[89] In enacting the new law, Congressional conferees made it clear that the new definition of "covert action" **exempts** "traditional military activities" as well as "traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities."[90]

An extension of the collection prohibition is an inability to analyze data. While some CLEAs allow the "pariah" national foreign counterintelligence community to analyze their respective data bases, there can be no permanent transfer of information as such would amount to collection.[91] This prevents the permanent transfer of narcotrafficking data from CLEAs to DoD intelligence files and hampers the systematic analysis Part III of this study demonstrates is essential.

Information that has been collected, analyzed, and maintained must be safeguarded. Two laws, the Freedom of Information Act[92] and Privacy Act,[93] allow citizens access to federal agency records. While exemptions and exclusions for law enforcement and national security matters protect most vital information, release of seemingly inocuous information can, as previously explained and addressed later in this part of the study, defeat confidentiality and thus a well planned counternarcotics operation.

The final hurdle, after collecting the data and protecting it from routine disclosure, is the courtroom. Here, the defendant's constitutional guarantees are often in direct opposition to the government's need to maintain investigative secrecy--whether it be to protect the informant or keep the shroud around ongoing operations. The Classified Information Procedures Act helps protect against having to disclose classified information to criminal defendants.[94] However, a judicial ruling that the collected intelligence is necessary for an adequate defense against the charges can force the government to elect between proceeding

with the charges or turning over the classified information for defense counsel's inspection.

Thus far, this section has examined Secretary Cheney's first two lines of defense against drugs, attack at the source and interdiction, and the laws that must be considered in carrying out these operations. The Secretary's final line of defense against illicit drug use is located in the United States. At home, the Department of Defense has been given the mission of reducing drug use by its members, emphasizing drug awareness in its school systems, assisting the Department of Justice with the latter's awesome task of incarcerating and rehabilitating drug offenders, and lastly, supporting drug enforcement agencies.[95]

Support to U.S. drug enforcement agencies has practical as well as legal liabilities attached. Any undertaking in this support arena must comport with the Posse Comitatus Act of 1878, as "refined" by separate legislation in recent years to assist in the "war on drugs."[96] Prevention of any specter of military control over the civilian populace has roots in the founding of this nation. Use of the military to enforce civil law has been clearly proscribed since 1878. While members of the active force can assist CLEAs and the National Guard with training, planning, information, logistics, and the operation of equipment, the law still precludes DoD personnel from performing searches, seizures, hot pursuit chases, or making arrests in the U.S. As the next part of the study emphasizes, active duty Military Police cannot be employed in the same manner as a CLEA in counterdrug operations.

Unlike laws discussed previously, where the military, by virtue of its support to federal CLEAs operating outside the territorial jurisdiction of the U.S., can perform roles more akin to direct law enforcement functions, Congress has held firm against expanding the role of the active duty armed forces within the U.S. beyond that of "supporter." Training U.S. law enforcement officials, to include low intensity conflict training in order to defeat inner city drug gangs,[97] providing and often operating equipment, and even deterring world-be drug smugglers through presence[98] are significant, measurable contributions to the supply abatement aspect of the "war."

In closing this overview of the law, a word about fiscal legislation is warranted. When loaning equipment, military leaders must determine whether DoD reimbursement under the Economy Act[99] or Intergovernmental Cooperation Act[100] is required. Additionally, the requestor must show that the state or local government has tried to further the U.S. policy of relying on private enterprise to provide the services reasonably and quickly through ordinary business channels.[101]

Unless the support provided the CLEAs is given in the normal course of military training or operations, or the benefit to the military is "substantially equivalent" to that which would otherwise be gotten from normal training or operations, or special support is congressionally mandated, as has been the case in recent defense appropriations, the recipient of the assistance must reimburse DoD.[102]

Support provided to federal CLEAs is reimbursed under the Economy Act. This law requires that DoD be reimbursed for all **indirect** as well as direct costs for both goods and services it provides other agencies. Any cost, to include salary, attributed to even the preparation of a piece of equipment for use by the FBI, for example, must be reimbursed.[103]

Support to state and local CLEAs, which does not meet the aforegoing criteria for exception, is reimbursed through the Intergovernmental Cooperation Act. Reimbursement is required for "pay and all other identifiable costs of providing the services,"[104] at a rate of non-DoD users of DoD assets.[105]

## APPLICATION OF THE LAW TO STRATEGY

*Laws are to govern all alike - those opposed as well as those who favor them. I know of no method to repeal of bad or obnoxious laws so effective as their stringent execution.*

ULYSSES S. GRANT

As previously noted, the law attempts to isolate members of the armed forces from activities that might impinge on the Fourth Amendment rights of American citizens. The constantly evolving law of search and seizure will test the military's verve in some cases as CLEAs request the latest innovations in the military's inventory in order to ferret out drug production and trafficking. One issue is whether the use of a particular device, operated by a member of

the armed forces and capable of providing good information, constitutes a search in contravention of the Fourth Amendment.

The issues surrounding the application of intelligence gathering to effective law enforcement, and their tension with the Constitution, can be seen in the use of infrared imaging equipment. A forward looking infrared radar (FLIR) is an instrument that has proven its capability in numerous military operations. Attached to a helicopter, an FLIR is able to detect the presence of heat rising from buildings where drug cultivation may be underway. While the imaging provided by use of the FLIR is not sufficient, in and of itself, to generate a warrant to search the building, it is another weapon in a CLEA's arsenal that can help stifle illegal activity. With additional information, a search warrant may be issued and a drug supplier's operations terminated.

In response to several requests for FLIR support, including personnel to operate the expensive aircraft to which it is attached, DoD General Counsel concluded that to use infrared imagery "to see" into private buildings constituted a search within the meaning of the Fourth Amendment. In consonance with this view, General Counsel recommended that requests for such operational support be denied.[106] Approximately one year after this opinion, the U.S. District Court for Hawaii held that the use of FLIR, by Hawaiian police authorities, in the navigable air space above the home of Janice Penny-Feeney in order to detect the amount of heat emanating from her garage was not an impermissible search.[107]

Both DoD General Counsel and Senior District Judge Pence, the author of the Penny-Feeney opinion correctly begin their analyses with Katz v. United States.[108] Katz transformed the law regarding Fourth Amendment protection. Henceforth, the person seeking this Constitutional protection must have a legitimate expectation of privacy in the space invaded. "In determining whether a legitimate expectation of privacy exists, two different considerations come into play: first, the individual involved must have exhibited an **actual** expectation of privacy; second, the expectation must be one that society is prepared to acknowledge as reasonable."[109]

At this point, General Counsel and Judge Pence part company. The court in Penny-Feeney described the heat arising from the structure as a byproduct of the energy sources used to grow Ms. Penny-Fenney's marijuana, and as such, it was waste. Since this heat waste was deliberately vented by exhaust fans, where it was then exposed to the public, the defendants exhibited no actual expectation of privacy, thus failing to satisfy the subjective prong of Katz.[110] The court continued, moreover, to find that the defendants failed to meet Katz's objective test as well. Analogizing the heat waste to garbage left on the street for collection,[111] Judge Pence denied the motion to suppress any evidence collected by using the FLIR.

After a thorough examination of recent Supreme Court cases involving Fourth Amendment questions, to include those where modern technology and sensory enhancers were employed and sanctioned by the courts,[112] DoD General Counsel arrived at the opposite

conclusion. Distinguishing FLIR from contraband-only sensing devices, such as a trained narcotics dog, and rejecting, as a "leap of faith," the notion that anything discovered outside the protected home by technology is ipso facto exposed to public view, DoD General Counsel honed in on the one overriding concern in the cases examined: the sanctity of the home, to include its curtilage. Unwarranted intrusions into the home, especially when the intrusive device, e.g., FLIR, can do no more than detect legal products--lights, insulation, etc.--should not be tolerated.

The impact of this decision is readily apparent. Although the advanced technological equipment could be loaned to CLEAs for their operators to use, or to the state National Guard for its personnel to operate in a Title 32 status, the armed forces will be reluctant to do so in many cases. Should the equipment be damaged in use, the readiness of the armed forces could be adversely affected, contrary to the statutory dictates explained earlier. Furthermore, the active component will receive no training or operational readiness benefit by merely loaning equipment. Accordingly, the borrower may have to reimburse DoD fully, and the funds may not be available "to rent" such expensive technology.

The impact of the reimbursement provisions of the Economy and Intergovernmental Cooperation Acts on the "drug war" strategy is probably unknown. Proving a negative is always difficult. To fully explore the impact of these laws, one would have to ascertain how often a request for assistance was never made because money was not available "to rent" the necessary goods and services. While

the accounting rules are sometimes cumbersome, especially regarding payment for military personnel detailed to other agencies, foreign governments, or international organizations, sound fiscal law principles are firmly in place.

Caution must always be exercised to ensure that any expenditure of funds is reasonably related to the purpose for which Congress appropriated the money. In some instances, such as training foreign personnel involved in counternarcotics work, Congress will permit such training with one authorization and prohibit it under another.

As with Fourth Amendment and reimbursement laws, caution must also be exercised when using foreign assistance money to integrate the "drug war" strategy. Legal restrictions on the training of foreign policemen and the transfer of modern military hardware will continue to have some negative impact on mission accomplishment. Money is available to train the armed forces of friendly nations in counternarcotics operations, but are these the right people to fight the "war on drugs?" Historically, and perhaps to some extent today, there is a fine line of distinction between soldiers and policemen in some of the drug producing countries. Being mindful of the dreadful conditions that exist within a totalitarian police state, Congress is rightfully wary of U.S. money and personnel training the oppressors. On the other hand, expending foreign assistance dollars training and equipping foreign soldiers to do what the U.S. leadership continues to regard as a law enforcement mission makes little sense either.

Sadly, the one law that has had a profoundly desultory impact on the drug strategy is the Anti-Drug Abuse Act of 1988.[113] It was this legislation that showed initial Congressional impetus to fight the "drug war." However, it was this act that created the Director of National Drug Control Policy, and then emasculated the "czar" by giving him no power. Charged with assembling an annual National Drug Control Strategy for the President's submission to Congress, the Director has no authority to carry it out. There is simply no one at a command center forcing coordination action, the sharing of intelligence, or making sure the "drug war" money Congress keeps appropriating is put to the best use.

While Secretary Cheney may be accused of overstepping his authority with his September 18, 1989, Memorandum of Guidance, at least he picked up the gauntlet and exhibited leadership. Rightly or wrongly, Secretary Cheney gave his department a strategy and began to take concerted military action. However, from a national, interagency perspective, the current attack on drugs resembles coalition warfare, but without a CINC to halt agency parochialism and implement the grand strategy.

This section began with an examination of a controversial Fourth Amendment issue and ends with an equally cantankerous, constitutional thorn--intelligence gathering and protection of the data collected. The inability of the national intelligence network to collect, store, and analyze data on international drug traffickers is hindering efforts to stem the flow of drugs into the U.S.

As evidenced by citizen outrage over abuses sanctioned by J. Edgar Hoover during his tenure as Director of the FBI, Americans do not want government agents "spying" on them. The prohibition against the national foreign intelligence community gathering intelligence on citizens within the U.S. is not only well founded, but also well grounded in constitutional precepts and the National Security Act of 1947.[114] However, when the laws, strictly interpreted, as they should be in this area, permit intelligence gathering on drug trafficking U.S. citizens abroad, but prohibit the maintenance of such files for use and analysis, the drug interdiction effort can be hamstrung. Likewise, when FBI and DEA agents cannot pass criminal files on U.S. citizens engaged in drug smuggling to DoD intelligence personnel who are trying to synthesize information from all sources and smash the drug ring, something is amiss.

Interdiction and arrest strategies are sometimes blunted by abuse of the Freedom of Information and Privacy Acts. A shrewd requestor can use a number of avenues to obtain information. Federal agencies do not coordinate these requests with one another, nor could they given the sheer volume and requirements for a timely response. Accordingly, a drug trafficker can theoretically get enough releasable information from various agencies to "piece together" the law enforcement agency's strategy and thereby thwart the ability to bring him to justice. While both laws are valuable to a free society, they should not be an impediment to prosecuting drug lords.

## PROPOSED INNOVATIONS

*Wrong must not win by technicalities.*

EUSCHYLUS

*All bad precedents began as justifiable measures.*

JULIUS CAESAR

DoD attorneys have wisely taken the conservative approach and restricted active duty military involvement in potential search and seizure matters. Since the violation of the Posse Comitatus Act carries criminal penalties, to include incarceration, prudence is the better form of valor. Nonetheless, Congress could provide support by amending the law so as to absolve armed forces personnel of liability in the search and seizure arena when they act in good faith and on the advice of legal counsel. The President's National Drug Control Strategy is essentially a national law enforcement tasking. The military's important role in this job not only points toward increased Military Police involvement, as explained later in this study, but also demands that service members be afforded maximum protection from both criminal and civil liability when acting properly and within the scope of their duties.

We have not come to the stage "if you have nothing to hide, you have nothing to fear."[115] Advanced technology is not the threat to civil liberties and Constitutional guarantees that Professor Stevens fears.[116] Even though technology will one day be able to pick up personal conversations in the house next door, society, and

hence the judiciary, is not prepared to recognize such an intrusion. Even those willing to give up some Constitutional guarantees to help win the war on drugs[117] would not go so far. To do so would abrogate all privileged conversations with those to whom we tell our darkest secrets--priest, lawyer, doctor, and spouse.

The Supreme Court has recognized such "doctrines" as the "good faith exception" and "totality of circumstances." It would be logical for Congress to apply something similar to the military regarding participation in searches and seizures. With the creation of a "good faith exception" and modification of 10 U.S.C. section 375, the armed forces could better support CLEAs. Such an amendment would remove the fear that the service member, such as the pilot flying an FLIR-enhanced helicopter, might be criminally prosecuted before a judge who disagrees with the sound advice rendered by a DoD lawyer before the mission is ever undertaken. By only amending 10 U.S.C section 375 and not the Posse Comitatus Act per se, Congress will **not** signal future military involvement in routine law enforcement matters. If any exception is made, it must be entirely to support the "war on drugs."

In the foreign assistance arena, Congress must amend the law, as some members attempted to do with the International Cooperation Act of 1991.[118] The prohibition against using Foreign Military Financing Program and International Military Education and Training funds to train and equip foreign law enforcement agents, for counternarcotics missions **only**, must be rescinded. This repeal

could be for a designated test period and should have attached to it the "respect for human rights" condition that is associated with most foreign aid. It is now time for DoD to train foreign policemen when requested by the host nation. If the focus of U.S. counternarcotics efforts is on law enforcement, with the military playing a supporting role, then it is important to reflect this philosophy worldwide. Training the armed forces of drug source nations to perform counternarcotics missions sends the wrong signal.

A second area is equipment. Laws should be liberalized so that narcotics-related excess defense articles can be transferred to the law enforcement units that our armed forces will train.

Finally, strong consideration should be given to providing narcotics-related assistance to some countries that would be ineligible for U.S. foreign assistance for other reasons. Reduction of drug use seems to be a national interest on a par with human rights and democratic government issues abroad. If the U.S. can provide the wherewithal for a country to eradicate its poppy, coca, or marijuana production in lieu of a different cash crop, or provide the funds for a small country to build a police force that will stop the transshipment of drugs at its ports, then it should do so.

Laws relating to intelligence gathering need modification. Concerns about sensitive information leaking through Freedom of Information and Privacy Act requests can be remedied by amending both acts to permit the government to deny the existence of

narcotrafficking criminal records. As intelligence operations become more centralized, perhaps at NDIC, all requests for information should be handled by that agency alone to help ensure uniformity of treatment and response.

Intelligence collection rules should be amended to permit the foreign national intelligence community to maintain files, for analysis purposes, on U.S. citizens suspected of trafficking in illegal drugs. The length of time for maintaining any such file could be statutorily restricted. If the drug dealer is important enough to grab the attention of the national intelligence community, it is likely that he is operating, to some extent, outside U.S. territorial jurisdiction. If so, the foreign national intelligence community can collect information, but must turn it over to a CLEA without a modification to the law. The ability to maintain files on narcotraffickers must not be interpreted as a signal for DoD or any other component of the foreign national intelligence apparatus to become involved in domestic intelligence gathering. This must be forbidden. However, unless CLEAs are able to share knowledge and expertise with the foreign national intelligence community on U.S. persons involved in transnational drug trafficking, the supply abatement portion of the drug strategy will continue to be adversely affected.

If, as the portion of this study discussing intelligence support to the "war on drugs" emphasizes, the intelligence effort needs a leader with clout, so does the entire National Drug Program. The ONDCP needs a director with the statutory authority

to carry out the national counterdrug strategy. This will allow all components of the "war on drugs" to be better integrated in order to achieve national objectives. Without a "CINC Drug War," noble individual or organizational efforts will die on the vine.

Since drug trafficking is an international as well as a domestic problem, the nation's leadership should become more involved in cooperative treaties that help stem the flow of drugs themselves. Current treaties directed at money laundering operations by drug cartels have proven successful.[119] Crippling the financial empire of a drug cartel is one component of a successful counterdrug strategy. However, it does not have the immediate impact on production and trafficking that is required to get drugs off the nation's streets.

Finally, rules of engagement for any domestic drug operation involving supporting military personnel need to be standardized at the national level. In particular, rules concerning the use of force and the inviolate right of self defense must be clearly understood during the planning phase of any operation. Disputes among Army headquarters, state National Guard headquarters, and CLEAs over definitions of hostile intent and deadly force, and rules concerning returning hostile fire and disengagement need to be resolved. Even with standard maxims, rules of engagement can be tailored to each scenario and incorporate state laws peculiar to a particular operation.

These suggested changes will provide DoD and CLEAs additional latitude and support in combatting the flow of drugs from abroad,

eradicating drugs produced in the U.S., and punishing those who violate narcotics laws. Nonetheless, facilitating law enforcement efforts to stem the **availability** of illegal drugs, both domestically and internationally, is not the final solution to the United States' drug abuse problem. Simply put, amending laws in order to make illegal drugs harder to procure is **not** the answer to winning the "war on drugs." Real success, if not victory, in the "drug war" lies in refocusing the nation's attention on demand reduction.

## PART V

## THE ROLE OF U.S. ARMY LAW ENFORCEMENT IN COUNTERNARCOTICS OPERATIONS

Parts III and IV have discussed intelligence issues and legal factors as they have influenced the Department of Defense. This part of the paper will discuss law enforcement, and specifically counternarcotics law enforcement, as it affects the Army only. The purpose is to concentrate on one branch of service and focus on how the "drug war" is affecting, and may affect, the future operations of a single branch.

To accomplish this objective, the study will define current doctrinal roles for the U.S. Army Military Police, discuss suggested additional roles as a result of counternarcotics emphasis, list some of the problems associated with adding additional roles, and recommend specific missions which concentrate more on demand reduction than supply interdiction. It bears reemphasizing that the Military Police are a part of DoD, and all the legal restrictions addressed in this study apply to the MP Corps as well. The word "police" is not, nor can it always be, synonymous with law enforcement.

### CURRENT DOCTRINE

Current doctrine defines essentially four roles for the United States Army Military Police.[120] These roles are: battlefield

circulation control, area security, enemy prisoner of war operations, and law enforcement operations. These roles essentially evolved and were refined in the mid and late 1970s as the Military Police Corps sought to establish its role on the battlefield and tried to decrease the commonly held belief that Military Police were essentially peacetime law enforcement soldiers. These newly defined roles were tested and validated in Operations URGENT FURY, JUST CAUSE, DESERT SHIELD, and DESERT STORM. As a direct result of the area security and battlefield circulation control missions Military Police have evolved into forces which have numerous weapon systems, inherent transportation, and sophisticated communications. As a result of the enemy prisoner of war and law enforcement missions, Military Police at all ranks and in all levels of schooling are instructed in military law, the proper use of force, and public relations. This evolution in missions and the resultant military schooling have given the Military Police Corps an unprecedented popularity and strong visibility in recent military operations. The combination of firepower, communications, public relations and use of force training, legal training, and intelligence have caused Army leaders at several levels to consider expanding current missions assigned to the Military Police. One mission area under study for expansion is the MP support role in the "war on drugs."

## EXPANDED MILITARY POLICE ROLES

The next part of this paper will discuss the suggestions advocating increased military police missions to support counternarcotics operations recommended in a recent study completed at the United States Army Military Police School located at Fort McClellan, Alabama. This study, completed in the spring of 1991, and endorsed by Major General Charles A. Hines, the Commandant of the Military Police Corps Regiment, recommends including four additional missions into military police doctrine. The additional missions are: border screening, customs augmentation, marijuana eradication, and training support.

Border Screening. Although the term border screening implies that both the Canadian and Mexican borders are involved, the study concentrated on the Mexican border because the El Paso Intelligence Center (EPIC) has estimated that seventy percent of the illegal drugs entering the United States enter across the Southwest border.[121] Border screening usually consists of three components: mobile patrolling, covert surveillance of airfields, and covert surveillance of suspicious areas (listening/observation posts). The MP study states that DoD personnel are prohibited from entering private land, even if invited, and even if accompanying U.S. Border Patrol agents. However, the border consists of approximately fifty percent public land where such legal restrictions do not apply and which appear to be just as lucrative to drug trafficking as does the private land. The study notes military police doctrinally

operate in three person teams and are equipped and trained almost exactly the same as Border Patrol agents. This training and equipment authorization originates from the traditional rear area security mission all Military Police are trained to perform.

The study recommends that Drug Law Enforcement Agency (DLEA) personnel accompany each three man mobile team. The study also notes that citizens of both countries living along the border would, in all probability, object to large scale movements of combat arms formations and that the Military Police would probably be accepted more readily among the population.

The use of covert listening/observation posts to either observe an airfield or a specific area is also particularly well suited for military police. Again, the three person team doctrinally used by Military Police in rear area security operations is well equipped and trained to accomplish this mission. The first scheduled use of Military Police units was to take place in September 1991 and was to involve units of the 720th Military Police Battalion from Fort Hood, Texas. However, Special Operations units were given the mission instead for a variety of reasons.[122]

Additional Military Police activities which would support border screening and interdiction operations include the use of ground radar or sensor surveillance and conducting military exercises to canalize smuggling activities.[123] While these are not exclusively Military Police roles, they can easily be performed by Military Police units and are listed in Joint Task Force Six User's

Guide as examples of DoD support to requesting law enforcement agencies.

While Special Operations and Intelligence units are well trained to conduct covert listening/observation post operations, Military Police units add the advantages of having been trained to observe, record, and testify to criminal conduct. In the ideal situation, the unit selected to conduct the covert operation would receive training from both of the other types of units in their specific capabilities.

The study recommends border screening operations be added to the other doctrinal missions for Military Police. The traditional missions of area security and battlefield circulation control have produced MPs who are already trained in exactly the same areas required by border screening operations.

Customs Augmentation. The study recommends that customs augmentation be identified as a doctrinal mission and added to MP units which have working dog teams as a mission statement. This recommendation seems almost redundant in that these missions are already being performed--primarily by National Guard Military Police dog teams. These teams operate under the direct supervision of U.S. Customs officials and are prohibited by the Posse Comitatus Act and DoD policy from detention and apprehension of suspects.

While the success of such customs operations is debatable, most authors favor an increase in support for inspection of incoming cargo. The Drug Enforcement Administration estimates 85 percent of the illegal drugs entering the United States is hidden

in legitimate means of transportation. The U.S. Customs Service estimates that only 10 percent of cargo containers are inspected due to its lack of manpower and the overwhelming size of the task. To appreciate the difficulty, one need only consider that over 8 million cargo containers arrive at U.S. seaports annually. Inspection is a time consuming, manpower intensive, unattractive task. As a result, cargo container inspection offers little risk to drug traffickers.[124]

The recommendation to include customs augmentation as a doctrinal mission is sound. It only makes sense to receive recognition for a task which is already being performed. The larger question is whether to amend the Posse Comitatus Act and expand the military involvement in customs operations. The military, and specifically Military Police, already perform customs operations outside of the United States. The expertise, structure, and experience already exist. The question is whether or not the military should be involved in stateside customs operations.

Marijuana Eradication. The study recommends that marijuana eradication be added as a counternarcotics mission for the MP Corps and that it also be added as a mission statement for the Combat Support Military Police Company. Perhaps no other counternarcotics mission so closely resembles a generic military mission as does marijuana eradication. Everything from security to transportation to patrolling to field messing is involved.

Although Operation GREEN SWEEP, conducted in August 1990, primarily by combat units of the 7th Infantry Division, has

received significant publicity, several smaller operations have been conducted with similar success. Several authors have highlighted the similarities of these operations and noted the strong influence the military has demonstrated when operating with civil law enforcement and the Bureau of Land Management. These authors point out that most of the missions are coordinated by the military, using a standard five paragraph field order, and are conducted almost exactly like a typical movement-to-contact operation.[125]

The National Guard has been particularly active in marijuana eradication efforts. Helicopter and logistics support have been provided to Operation WIPE OUT I and II in Hawaii and currently, the National Guard and the DEA are working together on the National Guard's plan to field Reconnaissance and Interdiction Detachments (RAID) in selected states. RAID will provide dedicated, full time helicopters and personnel to support drug law enforcement. The helicopters will be fitted with a thermal imaging system which will support investigative efforts aimed at indoor cannabis cultivation.[126] However, as the legal portion of this study explains, DoD General Counsel's interpretation of the Posse Comitatus Act will restrict military personnel supporting these operations.

Marijuana eradication has received strong support as a Military Police mission. The Military Police Support to the DoD Counternarcotics Operations study strongly recommended marijuana eradication be identified as an MP mission and that it be added to

the mission statement of the Combat Support Military Police Company. The study stated marijuana eradication supported other battlefield missions such as area security, battlefield circulation control, and law enforcement. The study also stated marijuana eradication allowed MP units to operate in the field and exercise command and control, supply, transport, and feeding missions while providing a morale booster because the units were participating in real law enforcement missions.[127]

Training Support. The last mission recommended by the Military Police Study is training support. Funding for training drug law enforcement agencies increased from 40 million dollars under the Fiscal Year 90 Defense Authorization Act to 50 million dollars in Fiscal Year 1992. Additionally, both the Army and the TRADOC counternarcotics plans clarified training policies which had been ambiguous or misunderstood in the past.

The central focus is one of conducting mobile training team missions to smaller, regional police forces.[128] The Military Police Support Study recommended that the Military Police School provide mobile training teams to conduct counternarcotics operations for requesting agencies, that the Military Police School create a Mobile Training Division, that a marketing strategy be developed to advertise the existence of the mobile training teams, and that the school develop Measures of Effectiveness to quantify training results.[129] As of November 1991, the Military Police School had developed a Mobile Training Division which coordinates the numerous requests for schooling and has developed four courses, each lasting

one week, that it has successfully conducted at various locations. The four existing courses are: The Counter-Drug Investigator's Course, The Field Tactical Operations Course (Marijuana Eradication), The Counter-Drug Special Weapons and Tactics Course (Drug Raids), and the Counter-Drug Executive/Witness Protection Course. Four additional courses are being developed and are projected to be ready for export in mid-1992. They are: The Drug Criminal Intelligence Course, The Marksman/Observer Course, The Drug Demand Reduction Programs Course, and the Drug Commander's Course.[130] The existing courses operate under a specific program of instruction and vary from 40 to 50.5 hours of instruction. According to spokesmen at the Military Police School, these courses are very popular and well attended.[131]

In addition to the roles recommended by the Military Police Support Study, numerous other roles for the Military Police Corps have been suggested by a variety of authors, self declared experts in counternarcotics operations, Military Police personnel, and various others. The roles vary from assigning individual Military Police personnel to civilian law enforcement agencies for extended periods, to conducting numerous courses in residence at the Military Police School, to extending mobile team training by increasing both the courses taught and the personnel assigned to the teams, to greatly increasing the community involvement of both active and reserve component Military Police personnel as a method of educating the younger public.

While it would be premature to judge the usefulness and

validity of these additional roles for the Military Police, certain observations can be made about the recommended additional roles suggested by the Military Police Support Study. Although every single Military Police person interviewed during the background study concurred in the additional missions recommended by the Military Police Support Study, all had reservations about how the Military Police Corps could accept additional missions during a time of decreasing resources and diminished personnel. While the U.S. Forces Command position is, and has been, to support the recommended additional missions listed in the Military Police Support Study, as of November 1991, not a single Military Police unit has been available to perform any one of the suggested additional missions. Military Police personnel, both active and National Guard, have supported civil police conducting the additional recommended missions, but they have done so as individuals and not as cohesive units.

Colonel James T. Rackstraw, U.S. Forces Command Provost Marshal, said he fully supported increased involvement by Military Police in counternarcotics operations and fully supported the additional missions recommended in the Military Police Support Study. However, he stated he could not see Military Police unit operations being conducted in the near future because of the numerous existing commitments.[132] For example, numerous Military Police units were deployed to Guantanamo Bay in December 1991, in support of operations to detain and house Haitians who were fleeing their country.

Perhaps an additional impetus for greater Military Police involvement in counternarcotics operations exists in tying MP support for low intensity conflict to counternarcotics operations. U.S. Army Field Manual 19-1 defines specific roles for Military Police in low intensity conflict. As part of foreign internal defense operations these roles are: conduct surveillance of the population, monitor borders, conduct checkpoints, and guard prisoners of war and/or civilian detainees.[133] Military Police operations in URGENT FURY, JUST CAUSE, and DESERT STORM entailed all of these tasks and solidified doctrinal roles for Military Police in low intensity conflict. Adding counternarcotics operations to the tasks already required of Military Police in low intensity operations would simply compartmentalize tasks for which MPs are alerady trained.

## CONSENSUS

It appears that the Military Police Corps, as the law enforcement agency of the Army, is particularly well suited for many counternarcotics operations and could easily assume additional missions as recommended by both the Military Police School Study and others. However, current commitments and the size of Military Police units have allowed only small excursions into counter-narcotics operations. Individual Military Police personnel, both active and reserve component, have worked with civilian law enforcement agencies. Some are currently assigned to major federal

organizations. Others have participated in joint training sessions. Some have participated in marijuana eradication operations, and still others have, on an individual bases, talked to various groups as part of a drug awareness program.

We, as the authors of this paper, are of the opinion that two major areas concerning the future role of the Military Police in counternarcotics operations need clarification.

The first area of concern should be the realization that U.S. Army Military Police, while particularly well suited for counter-narcotics operations, will rarely, if ever, participate in counter-narcotics operations in other than an individual basis. Although some National Guard Military Police companies may furnish a platoon to a marijuana eradication operation, to assume Military Police will operate as units in counternarcotics operations seems particularly optimistic and unrealistic. However, should the concept of tying Military Police support for low intensity conflict to counternarcotics operations gain momentum and acceptance, future counternarcotics operations could very well include MP unit involvement.

The second area of concern is that the Military Police, like so many other organizations, including the intelligence community, has concentrated its efforts on supply interdiction rather than demand reduction. Those advocating using Military Police to educate the younger public and those arguing for more involved community interaction have been far overshadowed by those favoring more active police roles in interdiction.

As the military services draw down, future arguments about the correct role of the military will probably escalate. Those who favor military involvement will probably argue that counter-narcotics operations provide real training, with a real enemy and the stress of a real battle. Those who favor the withdrawal or decrease of the military's involvement will probably argue that the military's reduced size makes counternarcotics operations too expensive in terms of training time, that the military is ill suited for counternarcotics operations, and, should there be an accident or deliberate loss of soldiers' lives during counter-narcotics operations, that soldiers were sacrificed on the wrong battlefield.

## CHANGE OF FOCUS

Many authors have suggested the most effective, and the cheapest, method to wage the "war on drugs" is to battle demand. They argue that regardless of past successes in interdiction, crop destruction, lab dismantling, and incarceration of offenders, drugs will always be a profitable and tenacious business as long as there is a demand. Although these authors vary in their approaches, most favor education as the cornerstone of a demand reduction program. Those who favor education argue the current "Just Say No" program has been responsible for the decline in drug use among teens. However, those who favor a more militant approach argue that increased police pressure has had a greater effect than educational

efforts. Because of the difficulties in measuring success, or the lack of it, in counternarcotics operations there is no clear answer to what efforts have had the greatest impact. Until this question of relative success is answered, most authors seem to favor a balanced approach.

As part of a balanced approach, perhaps the Military Police should add drug education to the additional roles of border screening, customs augmentation, marijuana eradication, and training support which were recommended by the Military Police Support Study. Most installations already have a public relations section or staff within the Provost Marshal's Office. This staff usually is responsible for briefing the post population on safety and security matters, crime prevention, traffic laws, and any other areas the command feels is important. Usually, a number of these briefings are conducted at the post schools. To add drug awareness or drug information to an already existing program would only entail increasing the education of the public relations staff. To add a similar program to an installation which does not have a public relations staff would entail educating and choosing the right person or persons for the job. Although Military Police are not the only branch capable of conducting a well-planned drug education program, they are particularly well suited for the task. Military Police training in recent years has been much more public relations oriented and interpersonal relationship instruction has been implemented in most Military Police courses. Additionally, classes taught by Military Police have the additional advantage of

having inherent credibility, depending upon the background and personality of the instructor.

Since reserve component and active duty Military Police are trained exactly alike and attend the same courses, reserve component Military Police could expand drug education programs to locations which do not have an active unit or installation. Reserve component Military Police units, like their active duty counterparts, usually have a section devoted to public relations or education which would be the logical choice to conduct drug awareness training. Some national guard and reserve units already have existing programs. As a model program, the New Mexico National Guard's Operation PLAN 1-91 excels. This comprehensive and ambitious plan outlines a statewide program involving media advertising, town meetings held in armories, units sponsoring schools, units sponsoring dances for teens, educating the local population in numerous areas, establishing youth groups, sponsoring retreats, and several other areas designed to reduce demand for drugs.[134] Central to the plan are detailed responsibilities and community involvement and support. While the New Mexico National Guard plan involves all units of the Guard, a similar program could easily be developed involving both active and Reserve/National Guard Military Police units. Similar to the New Mexico plan, this plan would have Military Police companies sponsoring different schools, conducting educational programs, sponsoring community activities such as sports events, teen dances, and summer camps, aligning with community businesses, and conducting advertising to

publicize MP involvement with the community.

## CONCLUSIONS

## MILITARY POLICE IN COUNTERNARCOTICS OPERATIONS

As a direct result of their training, education, high standards of entry, mobility, communications, and equipment, Military Police are particularly well suited for counternarcotics operations--if the trend continues to fight the "drug war" by concentrating on supply, rather than demand. Military Police could easily assume the additional missions recommended by the Military Police Support Study. However, these additional missions would, in all probability, be undertaken by individual Military Police personnel--rather than MP units.

During the last three "wars" Military Police units have been some of the first units demanded by senior leaders as a result of enemy prisoner of war operations. They have also been some of the last units to leave as a result of customs operations and assistance to the civil law enforcement infrastructure. As a result of increased visibility, Military Police companies are participating in more and more exercises, and the probability of using an entire unit in counternarcotics operations appears very small.

Perhaps more important than the size of Military Police involvement is the mission, or area of concentration. No doubt Military Police would be "successful" in counternarcotics

operations. Marijuana fields would be eradicated, working dog teams would detect narcotics, and listening posts would monitor movement along the Texas/Mexico border. All of these would be exciting and rewarding missions for the involved Military Police personnel and could easily be argued as valuable training. These missions may, in the future, fall to National Guard and Reserve Military Police units if the tie to low intensity conflict support is made. These missions are important and the Military Police can certainly play a much greater role in the supply side "war on drugs." Yet, the question has to be asked "Where should the emphasis be?"

The Military Police have a much more important role in demand reduction. If MP units were to vigorously assume the tenets as outlined in the New Mexico National Guard OPLAN 1-91 by greatly increasing their community involvement, we believe their efforts would be more useful in the long term.

## PART VI

## CONCLUSIONS AND RECOMMENDATIONS

The preceding discussion leads to several recommendations. Their implementation will require a dedicated resolve on the part of the nation's leadership and American people.

First, unity of command in the "war on drugs" is sorely lacking below the Presidential level. In both law enforcement operations and intelligence support activities a single leader, with the authority to specify missions and coordinate action, is required. Only Congress can do this by amending the law.

Second, to better integrate intelligence capabilities and functions with CLEA operations and to protect the data collected, Congress and the President need to amend the law and current Executive Orders. This will allow DOD intelligence analysts to provide better support by having continuing access to information on key individuals involved in criminal activities with greater assurance that critical information will not be divulged by one agency to the detriment of another's ongoing operation.

Third, to foster the stated philosophy that the abatement of drug supplies is truly a law enforcement function, Congress needs to amend laws so that DoD personnel can train foreign police officials and better equip them to combat narcotraffickers in drug source and transshipment countries. By revising a few previously discussed statutes dealing with assistance to CLEAs in the U.S., Congress would allow increased DoD support to these agencies in

both goods and services.

In the implementation of these changes, Congress should not disturb the fundamental principles which forbid intelligence gathering on U.S. citizens inside this country. In addition, particular care should be taken to prevent the military from acting as an "alter ego" of CLEAs to enforce domestic law.

While these recommended changes would surely enable DoD to perform its support role more effectively and efficiently, a broader issue needs resolution. One needs to ask, "will these modifications enable the U.S. to substantially reduce drug use among its citizens?" The answer is a resounding "NO". An analogy can be made to the futility of winning battles but losing the war, as illustrated by the famous exchange between Colonel Harry G. Summers, Jr. and Colonel Tu. When Summers pointed out to Colonel Tu that the North Vietnamese never defeated the U.S. on the battlefield, Tu retorted "that may be so, but it is also irrelevant."[135]

Although the battles that abate the supply of drugs must continue to be fought and won, it is time to focus on the "drug war's" real center of gravity, domestic demand. This is not America's first cocaine epidemic. Until the Harrison Act was passed in 1914, cocaine was legal in the United States. But, as David Musto points out, the passage of the law was routine; Americans had already seen the danger of drug abuse and had stopped using cocaine voluntarily.[136] Simply put, education was the key to success in the first part of this century. It is no less important

in the last decade of the century.

While education is certainly one concept or way to reduce demand, it is not enough. The search for a realistic strategy to fight the "war on drugs" requires a careful examination of other methods. Specifically, the nature of the "conflict" requires a careful examination of low intensity conflict (LIC) doctrine as it applies to both the supply abatement and demand reduction tenets of the strategy to reduce drug use.

The connection between LIC and drugs in some cases characterizes the relationship between insurgent/terrorists and the financial resources and security requirements of the drug production and trafficking organizations. The insurgent depends upon the drug trafficker for money and other resources while the drug trafficker depends upon the insurgent for protection of production, processing and trafficking operations. Operating under the country team's Internal Defense and Development umbrella, U.S. military assets support a host country's police and military in their effort to eliminate these elements. This includes the operations to destroy drug production, processing and distribution facilities, organizations and key leaders.

Herein lies a basic lesson the United States has had difficulty learning. The fundamental principle of LIC and counterinsurgency doctrine and its recipe for success is winning the hearts and minds of the people. For "drug war" efforts, this means that until the people and governments of the host countries fully support solving the drug situation within their own borders,

the supply abatement prong of the "drug war" campaign can not be victorious. This reality is reflected in the 6 January 1992 issue of Newsweek. "One of the principles of low-intensity conflict is that whoever has the will of the people wins the war," says one American military adviser in the Andes. "You know what that means in Bolivia? We've lost the war."[137] No amount of training and intelligence support will change this situation.

The fact that we're losing the supply side war is not the fault of LIC doctrine, but lies in our attempt to focus it towards the wrong center of gravity. We should be oriented towards the true center of gravity in the "drug war"--domestic demand.

One possible approach to a strategy for reducing domestic demand is the creative application of low intensity conflict doctrine, operational concepts, and procedures to the domestic "drug war." The United States' domestic problem with illegal drug use shares many characteristics with LIC. First, illegal drugs present a confrontation between groups and the established government. The courts, LEAs, and law-abiding citizens confront drug users and drug related crime daily. Second, the struggle has been, and is, protracted with no end in sight. Third, the struggle includes all levels of subversion, corruption and violence. Fourth, the struggle is being waged by a combination of economic, informational, social, and paramilitary means. Finally, the domestic "drug war" is many times localized, but its impact is both national and international. Since the domestic "drug war" fits the definition of LIC, there may be some reward in attempting to apply

the principles of LIC to the conflict.

Step one in LIC in to develop an understanding of the dynamics of the conflict. Understanding the LIC environment without personal prejudice and a self-righteous perspective facilitates an objective appraisal of where solutions to the problem lie. The dynamics of LIC include conditions that are associated with illegal drugs: poverty, discontent, and violence. In the "drug war," the problems of unemployment, discontent and violence, found in the typical "inner city" environment, promote illegal drugs as an avenue for personal, social and economic change. Eliminate these conditions and the "drug war" is on the way to being won. The way to do this is by basing the "drug war's" demand campaign strategy on the five LIC imperatives. Application of these principles may solve many, if not all, of the inter-agency, bureaucratic, leadership and resource problems confronting the "drug war" community. The five LIC imperatives as addressed in FM 100-20/AFP 3-20 are:[138]

POLITICAL DOMINANCE. All operations must be driven by democratically elected leaders. The chain of command for the drug war requires the active involvement, dedication and commitment of our leaders--President to Governor to Mayor. They are the commanders in the war. All other elements of national power answer to them and are supervised by them in an integrated and synchronized effort to established and accepted ends. Application of this imperative will resolve the fundamental problem in the "drug war" of "who is in charge?" The military would fit into this

chain by directing the local military installation commander or reserve component element to coordinate directly with the local and state leaders to provide equipment, education, public affairs, training and transportation support.

UNITY OF EFFORT. This requires all agencies to integrate and coordinate their efforts to contribute to the overall objective. Just as in LIC, this requires that civic actions such as medical support programs, psychological efforts (drug awareness, educational campaigns), and CLEA operations be synchronized and implemented towards achievement of a shared end. This imperative would resolve another fundamental problem with current "drug war" operations by creating teamwork and eliminating the competitiveness and "turf battles" between agencies. The military's major contribution in this arena would be in the application of planning techniques and expertise to aid in the development of integrated plans leading to synchronized execution by all agencies. In instances where active duty armed forces are remotely located or unavailable, the considerable expertise which the reserve component forces possess should be utilized.

ADAPTABILITY. Adaptability requires the willingness to change structures and methods to successfully meet the needs of evolving or differing situations. This imperative could apply to finding new roles for the military inside the United States. For example, various units could "adopt" local schools in much the same way that units now "adopt" local businesses under the corporate AUSA program. Military personnel could provide role models and

demonstrate to young people an alternative lifestyle to drug use. Opening the military's recreational facilities to young people through school or organizational sponsorship would provide additional contact and educational opportunities. The point is to be open minded and adapt to the needs of the situation.

LEGITIMACY. This imperative requires the people to accept the leadership of the government in the domestic "drug war." It also requires the acceptance of the goals and objectives of the entire effort. This is more than a "sales pitch" by the government. It is an effort to attract support for the overall program by sincerely and genuinely explaining what the problems are, how they affect society and what can and cannot be done to solve them. Without the complete support of the people the domestic "drug war" will not be won. In fact, today in the United States, there is no national consensus on how to fight and win the battle. The governmental leaders must generate grass roots support for the effort. The military can provide substantial support to the legitimacy of the overall governmental program to fight drugs. Today the military has earned and enjoys a reputation for professional excellence that is unparalled. By lending visible support to local and state programs, the military will assist in generating the grass roots effort needed to fight the war. The military needs to take an active but "backseat" role on the scale of other civic, church and school institutions. The civilian leadership of any community must lead the fight.

PERSEVERANCE. Just as in LIC, the domestic "drug war" does not have a clear beginning and will have no end marked by a decisive victory. The national leadership must accept this and convince Americans that there is no quick solution. The leadership must rise above the politician's short term, quick fix mentality and develop, implement and, most importantly, RESOURCE programs that are persistent, patient, and resolute in the longer term. The military is, without question, a model of perseverance in the domestic "drug war." When one examines the drug abuse statistics of the armed forces of the 1970s, and compares them with the relatively drug free military society of today, the message is clear. It has taken a score of years, but by the proper application of ways and means to the end, the armed forces have conquered the problem. Perseverance pays off. This imperative, if applied, would get us out of our fixation on tactical "drug war" successes that have had little impact on helping the nation achieve its overall "drug war" goal.

The application of LIC operational concepts and methods will help in the development of the equivalent of campaign plans to prosecute the domestic "drug war." The first step in planning will require the leadership to identify the conditions that must be created to achieve the "drug war's" goal. This will include the economic, social, and educational conditions that will contribute to the desired end state. Having identified and achieved consensus on what conditions are critical to success, the task of determining roles and missions for agencies involved and integrating these

efforts becomes easier.

The second step in planning is determining the sequence of actions, activities and/or programs that are necessary to reach the desired conditions and ends. This step helps identify and fix responsibility among and between agencies and promotes cooperation and synchronization of effort.

The final step in planning is orchestrating the application of resources. Based upon the results of steps one and two of the planning process, a clear identification of conditions to be created and sequence of actions needed to create them allows the establishment of resource allocation priorities. This puts the resources at the right place and at the right time.

The LIC planning process, if applied and disciplined, could end the current practice of all agencies constantly competing for resources to meet their peculiar agency objectives. As an example, if military law enforcement follows the LIC principles, they would allocate a greater portion of reserve component forces to interdiction efforts, increase the emphasis on public education as a means of demand reduction, and more succintly define the exact roles and missions of active and reserve component law enforcement units in counternarcotics efforts.

In conclusion, this study has shown that the country's effort to reduce drug abuse by concentrating on supply abatement is misplaced. While the recommended changes will provide for coordinated leadership and increased effectiveness in stemming the flow of drugs, a supply side effort will not win the "war." If

the drug market is to collapse, it will be when demand significantly decreases. Utilization of low intensity conflict principles, to combat domestic narcotic trafficking organizations has the potential, as Amanda Sue Currie ably documents, to reduce demand while abating supply.[139] However, her focus should be reversed. The application of low intensity conflict principles to a strategy that confronts the real center of gravity, domestic demand, can, and will, bring measurable success in reducing drug abuse.

## ENDNOTES

1. Mark P. Hertling, "Narcoterrorism, the New Unconventional War," Military Review, March 1990, p. 17.

2. Congressional Research Institute, Report of the Defense Policy Panel, Washington, DC, January 1990, p.17. Worldwide, gross receipts from drug dealing are estimated in excess of $300 billion--a figure that exceeds the gross national product of most developing countries. See, Raphael F. Perl, "United States International Drug Policy: Recent Developments and Issues," Journal of Interamerican Studies and World Affairs, Winter 1990, p. 127.

3. George Bush, National Security Strategy of the United States, Washington, DC: The White House, August 1991, p. 2.

4. Richard B. Cheney, Report of the Secretary of Defense to the President and the Congress, Washington, DC, January 1991, pp. 85-90.

5. 1988 U.S.C.C.A.N. (102 Stat.) 2503-2606.

6. Ibid., at 2575.

7. Ibid.

8. Ibid.

9. Ibid.

10. Ibid., at 2576.

11. Ibid., at 2577.

12. Ibid., at 2583.

13. 18 U.S.C. §1385.

14. Title 10, U.S. Code, Chapter 8, Military Support for Civilian Law Enforcement Agencies, after amendment, reads as follows:

§371. **Use of information collected during military operations.**

(a) The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.

(b) The needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account in the planning and execution of military training or

operations.

(c) The Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense and relevant to drug interdiction or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials.

§372. **Use of military equipment and facilities.**

The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes.

§373. **Training and advising civilian law enforcement officials.**

The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available--

(1) to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment, including equipment made available under section 372 of this title; and

(2) to provide such law enforcement officials with expert advice relevant to the purposes of this chapter.

§374. **Maintenance and operation of equipment.**

(a) The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available for the maintenance of equipment for Federal, State, and local civilian law enforcement officials, including equipment made available under section 372 of this title.

(b) (1) Subject to paragraph (2) and in accordance with other applicable law, the Secretary of Defense may, upon request from the head of a Federal law enforcement agency, make Department of Defense personnel available to operate equipment (including equipment made available under section 372 of this title) with respect to--

(A) a criminal violation of a provision of law specified in paragraph (4)(A); or

(B) assistance that such agency is authorized to furnish to a State, local, or foreign government which is involved in the enforcement of similar laws.

(2) Department of Defense personnel made available to a civilian law enforcement agency under this subsection may operate equipment for the following purposes:

(A) Detection, monitoring, and communication of the movement of air and sea traffic.

(B) Aerial reconnaissance.

(C) Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with such vessels and aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials.

(D) Operation of equipment to facilitate communications in connection with law enforcement programs specified in paragraph (4)(A).

(E) Subject to joint approval by the Secretary of Defense, the Attorney General, and the Secretary of State, in connection with a law enforcement operation outside the land area of the United States--

(i) the transportation of civilian law enforcement personnel; and

(ii) the operation of a base of operations for civilian law enforcement personnel.

(3) Department of Defense personnel made available to operate equipment for the purpose stated in paragraph (2)(C) may continue to operate such equipment into the land area of the United States in cases involving the pursuit of vessels or aircraft where the detection began outside such land area.

(4) In this subsection:

(A) The term "Federal law enforcement agency" means an agency with jurisdiction to enforce any of the following:

(i) The Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.).

(ii) Any of sections 274 through 278 of the Immigration and Nationality Act (8 U.S.C. 1324-1328).

(iii) A law relating to the arrival or departure of merchandise (as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401) into or out of the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States) or any other territory or possession of the United States.

(iv) The Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)

(B) The term "land area of the United States" includes the land area of any territory, commonwealth, or possession of the United States.

(c) The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available to any Federal, State, or local civilian law enforcement agency to operate equipment for purposes other than described in paragraph (2) only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law.

§375. **Restriction on direct participation by military personnel.**

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any support (including the provision of any equipment or facility or the assignment or detail of any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search and seizure, an arrest, or other similar

activity unless participation in such activity by such member is otherwise authorized by law.

§376. **Support not to affect adversely military preparedness.**

Support (including the provision of any equipment or facility or the assignment or detail of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such support will adversely affect the military preparedness of the United States. The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any such support does not adversely affect the military preparedness of the United States.

§377. **Reimbursement.**

(a) To the extent otherwise required by section 1535 of title 31 (popularly known as the "Economy Act") or other applicable law, the Secretary of Defense shall require a civilian law enforcement agency to which support is provided under this chapter to reimburse the Department of Defense for that support.

(b) An agency to which support is provided under this chapter is not required to reimburse the Department of Defense for such support if such support--

(1) is provided in the normal course of military training or operations; or

(2) results in a benefit to the element of the Department of Defense providing the support that is substantially equivalent to that which would otherwise be obtained from military operations or training.

§378. **Nonpreemption of other law.**

Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981.

§379. **Assignment of Coast Guard personnel to naval vessels for law enforcement purposes.**

(a) The Secretary of Defense and the Secretary of Transportation shall provide that there be assigned on board every appropriate surface naval vessel at sea in a drug-interdiction area members of the Coast Guard who are trained in law enforcement and have powers of the Coast Guard under title 14, including the power to make arrests and to carry out searches and seizures.

(b) Members of the Coast Guard assigned to duty on board naval vessels under this section shall perform such law enforcement functions (including drug-interdiction functions)--

(1) as may be agreed upon by the Secretary of Defense and the Secretary of Transportation; and

(2) as are otherwise within the jurisdiction of the Coast Guard.

(c) No fewer than 500 active duty personnel of the Coast Guard shall be assigned each fiscal year to duty under this section.

However, if at any time the Secretary of Transportation, after consultation with the Secretary of Defense, determines that there are insufficient naval vessels available for purposes of this section, such personnel may be assigned other duty involving enforcement of laws listed in section 374(b)(4)(A) of this title.

(d) In this section, the term "drug-interdiction area" means an area outside the land area of the United States (as defined in section 374(b)(4)(B) of this title) in which the Secretary of Defense (in consultation with the Attorney General) determines that activities involving smuggling of drugs into the United States are ongoing.

§380. **Enhancement of cooperation with civilian law enforcement officials.**

(a) The Secretary of Defense, in cooperation with the Attorney General, shall conduct an annual briefing of law enforcement personnel of each State (including law enforcement personnel of the political subdivisions of each State) regarding information, training, technical support, and equipment and facilities available to civilian law enforcement personnel from the Department of Defense.

(b) Each briefing conducted under subsection (a) shall include the following:

(1) An explanation of the procedures for civilian law enforcement officials--

(A) to obtain information, equipment, training, expert advice, and other personnel support under this chapter; and

(B) to obtain surplus military equipment.

(2) A description of the types of information, equipment and facilities, and training and advice available to civilian law enforcement officials from the Department of Defense.

(3) A current, comprehensive list of military equipment which is suitable for law enforcement officials from the Department of Defense or available as surplus property from the Administrator of General Services.

(c) The Attorney General and the Administrator of General Services shall--

(1) establish or designate an appropriate office or offices to maintain the list described in subsection (b)(3) and to furnish information to civilian law enforcement officials on the availability of surplus military equipment; and

(2) make available to civilian law enforcement personnel nationwide, tollfree telephone communication with such office or offices.

15. 1989 U.S.C.C.A.N. (103 Stat.) 1107:

The conferees agree that the Department of Defense has not acted as vigorously as it could have in implementing the responsibilities assigned to it by the National Defense Authorization Act for Fiscal Year 1989 (Public Law 100-456); note with approval the recently demonstrated commitment of the Secretary of Defense for the Department of Defense to contribute to the

national counter-drug effort; and underline their intention to oversee closely the efforts of the Department in the coming year.

The conferees agree that the Department of Defense can play a more effective role in the future and agree on a number of ways in which it can more effectively perform its detection and monitoring mission and provide more significant assistance to law enforcement and other agencies of the United States that have counter-drug responsibilities.

16. Richard B. Cheney, Secretary, Department of Defense Guidance for Implementation of the President's National Drug Control Strategy, Washington, DC: September 18, 1989.

17. 1989 U.S.C.C.A.N. (103 Stat.) 1108. See 10 U.S.C. 376, n.14 infra.

18. 1989 U.S.C.C.A.N. (103 Stat.) 1111 and 1113.

19. 31 U.S.C. 1535 (1988). See notes 95-101 and accompanying text for a more detailed discussion of reimbursement legislation.

20. 1989 U.S.C.C.A.N. (103 Stat.) 1111. National Guard personnel are regulated by title 32, U.S. Code, when they are not in Federal service, and may participate in law enforcement activities as directed by the Governor of their state.

21. See, National Defense Authorization Act for Fiscal Year 1991, 1990 U.S.C.C.A.N. (104 Stat.) _____. Title X of this Act addresses Drug Interdiction and Counter-Drug Activities.

22. Over $1 billion was authorized, broken down as follows: for operation and maintenance, $585,600,000; for procurement $345,300,000; for National Guard pay and allowances, $105,500,000; for research, development, training and evaluation, $47,700,000.

23. 1990 U.S.C.C.A.N. (104 Stat.) _____:

(a) SUPPORT TO OTHER AGENCIES.--During fiscal year 1991, the Secretary of Defense may provide support for the counter-drug activities of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency for any of the purposes set forth in subsection (b) if such support is requested--

(1) by the official who has responsibility for the counter-drug activities of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government;

(2) by the appropriate official of a State or local government, in the case of support for State or local law enforcement agencies; or

(3) by an appropriate official of a department or agency of the Federal Government that has counter-drug responsibilities, in the case of support for foreign law enforcement agencies.

(b) TYPES OF SUPPORT--The purposes for which the Secretary may provide support under subsection (a) are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State or local government by the Department of Defense for the purposes of--

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department of Defense.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in subparagraph (A) for the purpose of--

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department of Defense.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counter-drug activities within or outside the United States.

(4) The establishment (including unspecified minor construction) and operation of bases of operations or training facilities for the purpose of facilitating counter-drug activities within or outside the United States.

(5) Counter-drug related training of law enforcement personnel of the Federal Government, of State and local governments, and of foreign countries, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

(6) Aerial and ground reconnaissance outside, at, or near the borders of the United States.

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the Untied States.

(8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

24. See, n. 14, infra.

25. 1990 U.S.C.C.A.N. (104 Stat. 1629(d)) _____.

26. 1990 U.S.C.C.A.N. (104 Stat. 1629(e)) _____.

27. 1990 U.S.C.C.A.N. (104 Stat. 1631) _____.

28. 1990 U.S.C.C.A.N. (104 Stat. 1632) _____.

29. 1991 U.S.C.C.A.N. (105 Stat.) _____. The total FY92 authorization for DoD counterdrug activities was $1,188,600,000.

30. Mark L. Goldstein, "Drug Wars, Turf Wars," Government Executive, January 1990, p. 22.

31. Craig L. Carlson, "Measures of Effectiveness--The Key to a Successful National Drug Control Strategy," Military Review, August 1991, p. 93.

32. "The Newest War," Newsweek, 6 January 1992, p. 18.

33. Ibid.

34. U.S. General Accounting Office, "Drug Control-Issues Surrounding Increased Use of the Military in Drug Interdiction," Washington DC, April 1988.

35. U.S. Congress, House, Committee on Armed Services, "Narcotics Interdiction and the Use of the Military: Issues for Congress," 100th Congress, Washington, D.C., 1988.

36. George Bush, National Drug Control Strategy. Washington: The White House, February 1991, pp. 23-26.

37. General Accounting Office, Report to the Chairman, "Coordination of Federal Drug Interdiction Efforts," 15 July 1985, p. 2.

38. Bush, National Drug Control Strategy, pp. 116-118.

39. Nelson B. Johnson, "Intelligence Support to the War on Drugs," Signal, September 1989, p. 47.

40. Bush, National Drug Control Strategy, p. 116.

41. Carlson, "MOE-The Key to Successful NDCS," pp. 90-94.

42. General Accounting Office, Report to the Chairman, "War on Drugs-Information Management Poses Formidable Challenges," May 31, 1991, p. 1.

43. Ibid., pp. 7-13.

44. Ibid., pp. 2-7.

45. Ibid., p. 11.

46. Ibid.

47. Interview, Chief, Counter Drug-Joint Intelligence Center, Defense Intelligence Agency, Pentagon, 5 November 1991.

48. Bush, National Drug Control Strategy, p. 23.

49. U.S. General Accounting Office, "DRUG CONTROL-Impact of DoD's Detection and Monitoring on Cocaine Flow," Washington, DC, September 1991, p. 6.

50. Ibid., pp. 24-27. As Kristin Knauth points out, the surge in spending on high technology surveillance equipment is not the final answer to successful interdiction either. See, Kristin Knauth, "High-Tech Drug Interdiction: A Bust?" Government Executive, July 1991, pp. 30-32.

51. Grant Wardlaw, "Intelligence and the International Narcotics Problem: A Framework for Considering Options for the Future," Washington DC, January 1990, pp. 17-38.

52. Peter Reuter and Mark Kleiman, "Risks and Prices: An Economic Analysis of Drug Enforcement," Crime and Justice: An Annual Review of Research, Vol. 7, Chicago University Press, 1986, pp.316-318.

53. The Secretary of State is "responsible for coordinating all assistance provided by the United States Government to support international efforts to combat illicit narcotics production or trafficking." 22 U.S.C. §2291 (1988). See, Anti-Drug Abuse Act of 1988, Title IV, International Narcotics Control, Pub.L. 100-690 (102 Stat. 4261) for a more complete description of the Secretary of State's function in this area.

54. See, SECDEF Memo, Subj: Modification of DoD Directive 5525.5, "DoD Cooperation with Civilian Law Enforcement Officials," dated 20 Dec 89.

55. See, Dennis F. Coupe, Are Constabulary Forces Suited to Fight the Drug War?, prepared for the Conference on Ethical Dimensions of the Changing Use of Force at the Institute for International Peace Studies of the University of Notre Dame, Carlisle Barracks, PA: U.S. Army War College, (October 25, 1990): p. 16 citing William Barr, Office of Legal Counsel, U.S. Department of Justice, The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International Law (June 21, 1989).

56. 22 U.S.C. §2291 et. seq. (1988).

57. 22 U.S.C. §2291 (a)(1)(B); See, Bush, National Drug Control Strategy, pp. 77-91.

58. 22 U.S.C. §2291 (a)(2) (1988).

59. 22 U.S.C. §2291 (d) (1988).

60. 22 U.S.C. §§2291-2 and 2291-3 (1988).

61. 21 U.S.C. §881 (e)(1)(E) (1988).

62. 22 U.S.C. §§2151-2292 (1988).

63. 22 U.S.C. §2392 (c) (1988).

64. 22 U.S.C. §2291 a(b) (1988).

65. Thomas K. Emswiler, "Security Assistance and Operations Law," Army Lawyer, November 1991, p. 10 citing Department of Defense Manual 5105.38-M, Security Assistance Management Manual, para 10, 103A (October 1, 1988).

66. 22 U.S.C. §§2763, 2764, 2771 (1988).

67. 22 U.S.C. §§2761, 2762 (1988).

68. 22 U.S.C. §§2347-2347d (1988).

69. See 22 U.S.C. §§2346-2346d (1988).

70. 22 U.S.C. §§2751-2796d (1988).

71. See, e.g., 22 U.S.C. §§2413-2414 (1988). See also, Jeffrey A. Meyer, "Congressional Control of Foreign Assistance," The Yale Journal of International Law, Winter 1988, pp. 69-110 for a good review of the struggle between the President and Congress over control of foreign assistance policy.

72. 22 U.S.C. §2291 (c)(1) (1988).

73. 22 U.S.C. §2291 (c)(5) (1988).

74. 22 U.S.C. §2291 (c)(2) (1988).

75. 22 U.S.C. §2291 (c)(4) (1988).

76. 22 U.S.C. §2420 (1988).

77. E.g., the prohibition does not apply to: support given pursuant to International Narcotics Control Legislation (22 U.S.C. §2420(b)(1)); sharing criminal information with foreign police (22 U.S.C. §2420(b)(1)); "assistance, including training, in maritime law enforcement. . . skills" (22 U.S.C. §2420(b)(3)); "a country which has a longstanding democratic tradition, does not have standing armed forces, and does not engage in a consistent pattern of gross violations of internationally recognized human rights" (22 U.S.C. §2420(c)).

78. 1991 U.S.C.C.A.N. (104 stat.) 2003.

79. 10 U.S.C. §374 (1988). Text of the law is at n. 14, infra.

80. 10 U.S.C. §379 (1988). Text of the law is at n. 14, infra.

81. See, 10 U.S.C. §375 (1988). Test of the law is at n. 14, infra.

82. 10 U.S.C. §371 (1988) Text of the law is at n. 14, infra.

83. Amendment IV to the Constitution of the United States states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

84. William E. Flanigan, Jr., Edmund I. Kiley, and William R. Lipke, Integrating Drug Intelligence, National Security Program Discussion Paper Series, Cambridge, MA: Harvard University, John F. Kennedy School of Government, 1990, p. 41. See, National Security Act of 1947 (50 U.S.C. §401 et. seq.) and Executive Order 12333 of United States Intelligence Activities.

85. Flanigan, Integrating Drug Intelligence, p. 42.

86. Ibid. p. 47.

87. 22 U.S.C. §2422 (1988).

88. 1991 U.S.C.C.A.N. (105 Stat. 429) _____.

89. George Lander, Jr., Washington Post, August 16, 1991, p. 22.

90. Ibid., 1991 U.S.C.C.A.N. (105 Stat. 444) _____.

91. Flanigan, Integrating Drug Intelligence, p. 46.

92. 5 U.S.C. §552 (1988).

93. 5 U.S.C. §552(a) (1988).

94. See, Title 18, App. U.S.C. §§1-10 (1988). See also, Flanigan, Integrating Drug Intelligence, pp. 51-54.

95. Cheney, Department of Defense Guidance for Implementation of the President's National Drug Control Strategy, pp. 4-5.

96. See, n. 14, infra.

97. See generally, Amanda Sue Currie, Using Counterinsurgency Tactics in the Domestic "War on Drugs," Feasibility Study, Langley Air Force Base, VA: Army-Air Force Center for Low Intensity Conflict (April 1991).

98. Carlson, "Measures of Effectiveness," p. 93.

99. 31 U.S.C. §1535 (1988); See, 10 U.S.C. §377 (1988) at n. 14, infra. See also, Coupe, Are Constabulary Forces Suited, p. 18.

100. 31 U.S.C. §6501 et. seq. (1988). See, Coupe, Are Constabulary Forces Suited, p. 18.

101. 31 U.S.C. §6505 (1988).

102. 10 U.S.C. §377(b) (1988).

103. See generally, 57 Comp. Gen. 674 (1974).

104. 31 U.S.C. §6505 (b)(2) (1988).

105. See, DoD Instruction 7230.7. Waiver or reduction of the charges is possible when full payment by the State or local government is not in the program's best interests (para D.3.6.(2), DoD Instruction 7230.7.).

106. Office of General Counsel, Department of Defense, Memorandum, Subj: Operation of Thermal Imaging Equipment in Support of Civilian Law Enforcement Agencies, September 1990.

107. U.S. v. Penny-Feeney, 773 F. Supp. 220 (D. Haw. 1991).

108. 389 U.S. 347 (1967).

109. 773 F. Supp. at 225, citing 389 U.S. at 360-61 (Harlan, J. concurring).

110. 773 F. Supp. at 226.

111. In California v. Greenwood, 486 U.S. 35 (1987), the Supreme Court held that society was not ready to recognize, objectively, any expectation to privacy in such refuse.

112. E.g. U.S. v. Place, 426 U.S. 696 (1983); U.S. v. Jacobsen, 466 U.S. 109 (1984); U.S. v. Knotts, 460 U.S. 276 (1983); U.S. v. Karo, 468 U.S. 705 (1984); California v. Ciraolo, 476 U.S. 207 (1986).

113. 21 U.S.C. §1501 et. seq. (1988).

114. 50 U.S.C. §401 et. seq. (1988).

115. Gene Stephens, "High-Tech Crime: The Threat to Civil Liberties," The Futurist, July-August 1990, p. 22.

116. Ibid., pp. 20-25.

117. According to a recent poll commissioned by the American Bar Association, "more than half those surveyed are willing to give up some of their Fourth Amendment protections against search and seizure to help win the war on drugs." Mary Deibel, Patriot-News, December 15, 1991, p. 1. For a differing view, see the comments of yachtsmen about the powers of the Coast Guard and others fighting the "war on drugs" in a 1990 edition of Yachting magazine. Tom Sawyer, "Has the Coast Guard Gone Too Far?" Yachting, February 1990, pp. 65-69.

118. U.S. Congress House, Committee on Foreign Affairs, International Cooperation Act of 1991, Report 102-96 on H.R. 2508 together with Minority, Dissenting, and Additional Views, Washington: GPO (1991).

119. See, e.g., A.V. Lowe and Colin Warbrick, ed., "Current Development: Mutual Assistance in Criminal Matters," International and Comparative Law Quarterly, October 1989, pp. 954-965 and 959-963. See also, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, particularly, articles 3, 7 and 9. Treaty Doc 101-4 (U.S. Senate), Washington: GPO (1989).

120. United States Army Field Manual 19-1, Military Police Support For The Airland Battle, Headquarters Department of the Army, May 1988, pp.3-1 - 3-10.

121. Major General Charles A. Hines, Military Police Support to Department of Defense Counternarcotics Operations, undated, p. 4-4.

122. Interview, Colonel James T. Rackstraw, U.S. Forces Command Provost Marshal, Atlanta, Georgia, November 22, 1991.

123. Joint Task Force-Six User's Guide, undated, pp. 6,7.

124. Carlson, "MOE-The Key to Successful NDCS," p. 92.

125. Hines, pp. 4-12, 4-13.

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