

# *Department of Defense* on the *South West Border*

**by Robert D. Schroeder**

The use of military capabilities to support federal, state, and local law enforcement is not a new concept. For years, domestic law enforcement agencies requested the help of military training, equipment, and personnel to help shape and refine policing tactics and fill shortfalls within an agency. The use of the military has proven vital to securing America’s borders, and it is imperative agencies use unique military capabilities to their fullest potential while operating within the confines of codified laws and on politically realistic terms. From the inception of Joint Task Force Six (JTF-6) in 1989, defense support for civil authorities (DSCA) has been seen as a “stopgap” measure when additional force was needed. However, the threats of increasing violence destabilizing Mexico and terrorists crossing America’s borders create situations that require domestic interdiction agencies to request additional military support. These agencies should not view Department of Defense (DoD) assets as brief enhancements to domestic operations but rather as a vital security tool that can provide a force multiplier for domestic law enforcement. The right combination of unique capabilities, authorities, and deployment flexibility can provide the force multiplier these agencies need to secure the borders.

## **History of Military Use on Southwest Border**

The Immigration Act of 1924 established the United States Border Patrol (USBP) as the lead enforcement agency to patrol the sparsely populated areas between the legally-established points of entry into the U.S. Over the course of 90 years, the strategies and objectives changed, but the mission to secure the areas between the ports of entry along the border has remained constant.

Prior to the 1980s, drugs flowing north into the U.S. consisted mainly of marijuana and heroin;

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however, cocaine usage continued to increase, as crack cocaine soon became the drug of choice among many U.S. drug users.<sup>1</sup> In the 1980s, President Ronald Reagan launched a heavy interdiction campaign on maritime smuggling routes from Columbia to Florida, which successfully disrupted maritime smuggling routes. The ensuing cocaine wars between the “cocaine cowboys” in Florida forced a shift from maritime operations to land-based routes.<sup>2</sup> This shift forced long-time Columbian producers to partner with Mexican cartels who controlled the well-established smuggling routes in northern Mexico.<sup>3</sup>

JTF-6 was established to support local, state, and federal law enforcement agencies within the southwest border region to counter the flow of illegal drugs into the U.S. The 2004 National Defense Authorization Act precipitated by the terrorist attacks of September 11, 2001, brought changes to border security strategies. The Act authorized DoD to expend funds for counterdrug operations and to support counterterrorism task forces to exploit the potential relationship between the illegal narcotics trade and terrorism.<sup>4</sup> On September 28, 2004, JTF-6 was officially renamed Joint

completed over 600 missions in support of U.S. law enforcement and counterdrug task forces.

In 2005, JTF-N provided 400 Soldiers along the New Mexico-Mexico border in support of the USBP’s Operation Western Vigilance. In May 2006, Operation Jumpstart (OJS) began to deploy National Guard Soldiers to the southwest border. Between 2006 and 2008, 6,000 Soldiers deployed, making OJS the largest deployment of DoD personnel to the southwest border in recent history. OJS was structured to supplement enforcement operations along the southwest border in support of the USBP, while the agency recruited and hired additional border patrol agents. The federal government funded the operation; however, National Guard units remained under the control of the governors of the states in which they served.

As OJS National Guard units withdrew and the USBP increased its ranks, the need for more technology and military capabilities in a support role along the southwest border was evident, and Operation Phalanx was launched in July 2010. Operation Phalanx was based on an Executive Order authorizing up to 1,200 National Guard Soldiers and Airmen along the 1,933-mile southwest border in support of Customs and Border Protection (CBP).

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## **Brewing Problems**

Many believe the military is the wrong tool to use to secure the southwest border. The 1997 death of Esequiel Hernandez, an 18-year-old American citizen, is commonly used to argue against using DoD capabilities to help secure the southwest border. Hernandez was shot after he fired on a U.S. Marine patrol deployed in support of USBP operations near Redford, TX.<sup>5</sup> Incidents such as these are regrettable and may occur regardless of the types of troops who patrol the border. However, these incidents heavily influence public opinion and add to the perception that the U.S. border is being militarized.

Task Force North (JTF-N), and its mission was expanded to include providing homeland security support to the nation’s federal law enforcement agencies. To date JTF-N has

Critics of DCSA operations are quick to cite the Posse Comitatus Act (PCA) to defend their objections to the use of the military on the southwest border.<sup>6</sup> Motivated by resentment of military enforcement of the civil law during Reconstruction and specifically by the controversial stationing of the military at polling places in some southern states during the 1876 Presidential election, Congress enacted the PCA in 1878.<sup>7</sup> The PCA places reasonable restrictions on the use of federal military forces to operate as lead domestic law enforcement entities.<sup>8</sup> However, the PCA also restricts federal military personnel from conducting searches and seizures and affecting arrests of subjects in violation of U.S. civil laws, regardless if done in a supporting role. While the PCA does address legitimate concerns when limiting the power of the federal government, it is important to consider the environment and political pressures that existed when the PCA was created. In today's environment, the PCA unnecessarily exposes the federal government to excessive scrutiny and frivolous claims of violation.

### **JTF-N Authority**

Title 10, U.S. Code, Chapter 18, "Military Support for Civilian Law Enforcement Agencies," authorizes military support for civilian law enforcement agencies. JTF-N deploys Soldiers in support of civil authorities under this title. JTF-N has undertaken multiple engineering projects along the southwest border and deploys Soldiers for short-term operations.

JTF-N recruits and employs units on a strictly voluntary basis; JTF-N has no assigned forces. These Title 10 deployments concentrate support on militarily unique skills and capabilities that domestic law enforcement agencies lack or cannot practically replicate. Title 10 counterdrug support (CDS) must also provide a training opportunity that contributes to combat readiness and cannot be used for

continuing, on-going, long-term, operational support commitments at the same location.<sup>9</sup> The use of Title 10 units is effective in large-scale fencing operations or for missions where JTF-N requires a unit's mission essential task list and critical capabilities. However, the short rotation (30–60 days) coupled with the 180 days required for mission authorization through JTF-N limit the deployment potential for detection and monitoring missions. In addition, the limited maneuverability with combat vehicles due to environmental and right of entry concerns further degrades the monitoring and detection deployment potential.

From February to April 2012, a high-profile joint operation, dubbed Operation Nimbus II, was conducted in New Mexico and Arizona with CBP and JTF-N Title 10 Soldiers. These units were required to have USBP agents assigned to each team. This requirement precluded employing these agents in other areas where increased patrols could have been

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effective. This operation demonstrated the workforce and military technology that can be deployed in support of the USBP; however, it also highlighted its limitations. These types of operations are short in duration and leave capacity gaps when completed.<sup>10</sup> In many instances, transnational criminal organizations simply pause operations or move until the Title 10 units have withdrawn.

## **National Guard Support to Counterdrug Program**

National Guard members may be ordered to perform full-time duty under section 502(f) of Title 32, U.S. Code, to support the federally-mandated counterdrug program. National Guard units deployed during OJS and Operation Phalanx did so under this provision.<sup>11</sup> OJS

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National Guard units were divided into entry identification teams (EIT) and deployed at fixed interdiction sites specified by CBP. Similar to Title 10 forces, National Guard units serving under this provision deployed at prepositioned sites dictated by CBP. These sites were high visibility and served a deterrent function that assisted interdiction efforts. These units worked under the same guidelines as Title 10 Soldiers. This arrangement tied both the EITs and USBP agents to static, predetermined locations, regardless of the evolving tactical situation on the ground. Both OJS and Operation Phalanx were hindered by right of entry agreements.

Up to 4,000 National Guard members are authorized to perform drug interdiction or counterdrug activities in all 50 states and 6 territories.<sup>12</sup> These Soldiers, deployed under Title 32 § 112 CDS, fall under the command of the State Governor and the Adjutant General (TAG). This federal exemption from PCA allows for a much more flexible use of military assets and abilities.<sup>13</sup>

Notwithstanding this exemption, the Secretary of Defense has imposed policy

restrictions that mimic the PCA. These policies restrict the roles Title 32 § 112 units can assume while in support of drug law enforcement agencies, specifically, the ability to arrest.<sup>14</sup> Regardless of these policy restraints, units deployed under Title 32 § 112 are legally exempt from PCA and the associated lawsuits, liabilities, and legal challenges that have plagued federal deployments.<sup>15</sup> Units deployed under Title 32 § 112 would have the authority to conduct surveillance operations within the U.S. under the direction of federal agencies operating along the southwest border. These Soldiers are working in their home states and are able to fully integrate into the border patrol operational rhythm, as the length of their service both in time and location is extended far beyond those of their Title 10 & Title 32 § 502f counterparts.

## **USBP: Deming and Lordsburg Corridor**

Lordsburg and Deming border patrol station's operational environment extends from Columbus, NM, to the Arizona/New Mexico state line. This area is sparsely populated and includes many miles of mountainous terrain and multiple national parks. The border patrol must obtain rights of entry or pass-through rights on private property to deploy military units in support of the counterdrug mission. Under the Operation Phalanx memorandum of understanding, Title 32 § 502f OJS and Operation Phalanx units deployed in the Deming and Lordsburg operational environment worked at fixed sites using detection and monitoring equipment. Roving patrols were strictly prohibited.<sup>16</sup> These fixed sites were limited, and the majority of these pre-approved sites were many miles from the international border and increased the distance a potential threat was able to travel within the U.S. before detection. Because of the relatively short deployment lengths under both Title 10 and Title 32 § 502f, Soldiers have little time for area orientation,

which proves to be an obstacle when threats are detected and they must redeploy to an alternate site. This requirement is made easier when National Guard and local stakeholders forge long-lasting relationships. The sustained deployment of Title 32 § 112 units maintains the continuity of relationships between the USBP and the Soldiers deployed to support them. This long-term sustained deployment is typical of Title 32 § 112 Guard units and maximized their potential.

### **Counter Drug Support to Law Enforcement Agencies on the Southwest Border**

While OJS and Operation Phalanx deployments along the southwest border undoubtedly had a positive effect on border patrol apprehension rates in the short term, is this method the best use of highly-trained National Guard units? A recent Government Accountability Office study looked at OJS (2006–2008) and Operation Phalanx (2010–2011). OJS cost \$1.2 billion over the course of two years, and Guard soldiers assisted in 11.7 percent of all illegal immigrant apprehensions and 9.4 percent of all marijuana seizures along the southwest border.<sup>17</sup> Operation Phalanx cost \$110 million, and the National Guard assisted in 5.9 percent of all illegal immigrant apprehensions and 2.6 percent of all marijuana seizures along the southwest border. While these numbers show significant support for the border patrol, they are paltry when compared with Title 32 § 112 CDS units. In 2011, with a budget of \$203 million, CDS units in the four southern border states of California, Arizona, New Mexico, and Texas participated in over 19 percent of all apprehensions and 14.3 percent of all marijuana seizures.<sup>18</sup>

### **The Path Forward**

The use of U.S. military capability along the southwest border has reinforced and strengthened

the border patrol, but it also left many in the law enforcement community questioning the effectiveness of their deployments. Local stakeholders routinely voice their concerns over what they consider a lack of enforcement personnel along the southwest border. The desire of the local citizens for “boots on the ground” to interdict groups of smugglers and illegal aliens is understandable; however, sporadic thickening of the enforcement line along the southern border is only treating a symptom of a much larger problem.<sup>19</sup> The question remains as to how to deploy military units more effectively to secure the border and best utilize National Guard funding to achieve the greatest operational impact in controlling the ever increasing violence the USBP faces on

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What is needed on the southwest border is a more robust integration of three distinct capabilities that interdictors cannot easily replicate: close air support, military intelligence gathering and analysis, and signals intercept. Many of the interdiction agencies working along the border attempted to develop these capabilities, but reduced budgets and escalating training costs have hindered their ability to do so. Helicopter support multiplies the effectiveness of USBP agents, as helicopters can navigate the difficult terrain. Focusing National Guard units to support these three capabilities will

make them more responsive to border patrol requirements and reduce duplication of effort.

Given the specific authorities and the mission-duration limitations of both Title 10 Soldiers and National Guard unit deployments, it makes sense to use Title 32 § 112 CDS units for intelligence training and analysis deployments. The extended lengths of CDS deployments are better suited for supporting the longer-term investigative and analytical tasks.

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When detection and monitoring missions are needed, Title 32 § 112 CDS units are again better situated to assist interdiction agencies, as they are not restricted to predetermined locations. Although they are still required to have an agent in close proximity, they are able to conduct roving patrols and move to locations typically off limits to Title 10 and 32 § 502f units. CDS units are capable of deploying rapidly in the event a changing operational environment requires military support, as opposed to the 180-day turn around required for support from JTF-N. Using Title 32 § 112 CDS units allows the USBP to integrate these Guardsmen into intelligence gathering and analysis work. In addition, their knowledge of the operational environment, facilitated by lengthy deployments, increases their effectiveness in the field. With the expected draw down of Title 32 § 502f Guard units serving under Operation Phalanx, it is essential that troops assigned to longer-term CDS operations in support of the USBP be increased and augmented with funding

above and beyond the current levels typically allotted to Title 10 and Title 32 § 502f Guard units.

## Recommendations

These recommendations would streamline DoD support of law enforcement agencies along the border:

- JTF-N should be responsible for infrastructure and intelligence analyst requests initiated from law enforcement agencies. JTF-N has taken the lead in many DHS requests for infrastructure fencing and road projects. JTF-N has relationships with military engineering units that routinely volunteer for training and deployment opportunities along the southwest border.<sup>20</sup>
- The employment of DoD assets in DSCA operations should be divided and specifically assigned to units who can best fulfill the request through specific authorities: JTF-N should assume longer-term, air support missions that are not time sensitive, and Title 32 § 112 CDS units should assume detection and monitoring missions, intelligence gathering and analysis, and short-response, close air support.
- Title 32 § 112 units need uniform rules regarding the use of force along the entire border region. Currently rules for the use of force rules differ from state to state.
- The use of military personnel deployed at fixed-site, overwatch locations should be substantially reduced or eliminated. Military personnel should concentrate on intelligence analysis, signals intelligence, and aerial surveillance (i.e., close air support, unmanned aerial system, and fixed-wing aircraft). These are tasks that cannot be readily replicated by border patrol agents.

- Title 32 § 112 units should be fully integrated into the CBP/Office of Border Control strategic planning process. DoD should prepare for an enduring National Guard integration and prepare memorandums of understanding with California, Arizona, New Mexico, and Texas to ensure a continuity of effort in a unified deployment strategy.

In this economic environment of shrinking budgets and the increased focus on integration and collaboration efforts, it is vital to maximize the capabilities of available resources. Some say the military is the wrong tool for the job; however, experience shows it is the right tool but too often used in the wrong way. To truly have a lasting impact, DoD must provide agencies with the knowledge, skills, and capabilities to fill the gaps. Simply conducting surveillance operations and replicating current border patrol agent tasks does not fulfill the DSCA mission. A more effective employment of military capabilities within legal authorities would be far better than the current approach to military support to law enforcement along the southwest border. **IAJ**

## NOTES

- 1 Bruce M. Bagley and William O. Walker, (eds.), *Drug Trafficking in the Americas*, North-South Center, University of Miami, Coral Gables, 1996, p. 98.
- 2 Robert C. Bonner, “The New Cocaine Cowboys: How to Defeat Mexico’s Drug Cartels,” *Foreign Affairs*, Vol. 89, No. 4, 2010, p. 35.
- 3 Bruce M. Bagley, *Myths of Militarization: The Role of the Military in the War on Drugs in the Americas*, North-South Center, University of Miami, Coral Gables, 1991, p. 87.
- 4 “Boots on the Ground or Eyes in the Sky: How Best to Utilize the National Guard to Achieve Operational Control,” House Homeland Security Subcommittee on Border and Maritime Security hearing, p.3, Congressional documents and publications, <<http://homeland.house.gov/hearing/subcommittee-hearing-boots-ground-or-eyes-sky-how-best-utilize-national-guard-achieve>>, accessed on April 23, 2012.
- 5 A full investigation of the incident was undertaken and the Marine patrol was ultimately cleared of any wrong doing.
- 6 Posse Comitatus Act, 18 U.S.C. § 1385. The phrase “posse comitatus” is translated from Latin as the “power of the county” and is defined in common law to refer to all those over the age of 15 upon whom a sheriff could call for assistance in preventing any type of civil disorder. See generally *United States v. Hartley*, 796 F.2d 112, 114, n.3, 5th Circuit, 1986.
- 7 Sean J. Kealy, “Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement,” Vol. 21, *Yale Law and Policy Review*, 2003, p. 383 and pp. 389–398.
- 8 Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877*, 1988, p. 604, <<http://books.google.com/books?id=cwVkgvctCcC&pg=PA604&dq=%22What+remains+certain+is+that+Reconstruction+failed.&hl=en&sa=X&ei=cDVbT4OODo2nsALDmNnEDQ&ved=0CDIQ6AEwAA#v=onepage&q=%22What%20remains%20certain%20is%20that%20Reconstruction%20failed%2C&f=false>>, accessed on Feb 21, 2012.
- 9 “Boots on the Ground or Eyes in the Sky,” p. 1.
- 10 Marisa Gerber, “BP Calls in Troops to Bolster Security,” *Nogales International*, February 24, 2012, <[http://www.nogalesinternational.com/news/bp-calls-in-troops-to-bolster-security/article\\_d25b0350](http://www.nogalesinternational.com/news/bp-calls-in-troops-to-bolster-security/article_d25b0350)>

5efb-11e1-b6d2-0019bb2963f4.html?mode=story>, accessed on May 3, 2012.

11 Major General Hugo E. Salazar, report delivered to the House Homeland Security Committee, Subcommittee on Border and Maritime Security, Arizona National Guard Border, 112th Congress, 1st session, 2011.

12 Ibid.

13 *Gilbert v. United States*, 165F.3d 470,473, 6th Circuit, 1999. State used National Guard for narcotics interdiction efforts.

14 National Guard Regulation 500-2, *Emergency Employment of Army and Other Resources, National Guard Counterdrug Support*, Department of the Army and Air Force, National Guard Bureau, paragraph 2-1e.

15 *United States v. Bacon*, 851 F.2d 1312, 1313, 11th Circuit, 1988, (per curiam). “Even if the participation by military personnel in this drug investigation is to be considered a violation of the Posse Comitatus Act, it was not a willful violation of the spirit of the Act”; *United States v. Walden*, 490 F.2d 372, 376, 4th Circuit, 1974. “While the bulk of the evidence was obtained by violating the Instruction, there is totally lacking any evidence that there was a conscious, deliberate or willful intent on the part of the Marines or the Treasury Department’s Special Investigator to violate the Instruction or the spirit of the Posse Comitatus Act. From all that appears, the Special Investigator acted innocently albeit ill-advisedly.”

16 This was considered standing operating procedure when I worked with National Guard units that deployed in Lordsburg and Deming. This issue was also discussed and the practice affirmed during a discussion briefing at JTF-N on December 8, 2011.

17 Sylvia Longmire, “Is the US Military’s Involvement in Border Security Too Expensive?” *HS Today. US*, January 13, 2012, <<http://www.hstoday.us/briefings/correspondents-watch/single-article/is-the-us-militarys-involvement-in-border-security-too-expensive/c7963abc47990eee4cbb12900e9e9533.html>>, accessed on May 1, 2012.

18 Figures obtained from interviews with former CDS operators from the National Guard assigned to Fort Leavenworth, KS, May 2012.

19 From February 2011–August 2011, I served as a field operation supervisor in command of two forward operating bases situated within the Chiriucua and Peloncillo mountain ranges near the AZ-NM state line. During this time, I routinely interacted with local ranches in the San Bernardino valley as I attended quarterly meetings with stakeholders from the Malpai Borderlands Conservation Group.

20 In discussion and briefings held at JTF-N at Fort Bliss, TX, December 2011.