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Optimizing Use of the Armed Forces in Combating Mexican Drug Trafficking Organizations

by Braden Civins

The drug war in Mexico threatens the stability of the Mexican federal government, catalyzes widespread border crossing by undocumented aliens (UDAs), and imperils U.S. citizens on both sides of the border. This note examines one proposal to address these concerns—additional deployment of the military along the southwest (SW) border—and the legal issues potentially raised by this response. Part I of this note provides background information on the nature of the problem. Part II traces the law governing military support to civilian law enforcement agencies (MSCLEA) with respect to counternarcotics (CN) operations along the southwest (SW) border. Part III examines how the law will either constrain or facilitate MSCLEA with respect to surveillance and detention operations. Part IV offers recommendations to improve the utility of military deployment to the border to combat drug trafficking organizations (DTOs).

Background

The pervasiveness of illicit narcotics in the United States is neither a new phenomenon nor are the DTOs that produce, transport, and distribute them. Historically, Mexican DTOs conducted trafficking operations with impunity as a result of an implicit agreement with the Mexican government.[1] This arrangement fell apart in 2006, when Felipe Calderon was elected President and declared war on DTOs. Since 2007, more than 22,700 people have been killed in Mexico's drug war. The violence has largely escalated from year to year, with 9,635 people killed in 2009 alone, the highest annual death toll since the war began. Between January and March of 2010, 3,365 people have died as a result of the conflict, putting 2010 on track to be the conflict's deadliest year.[2] In the past two years, approximately 30,000 Mexicans, fleeing the ongoing violence, have sought refuge in El Paso, Texas.[3] While Calderon's efforts have been successful in taking down high-level DTO personnel, narcotics continue to pour across the border. Although DTOs continue to utilize rudimentary means of smuggling, they also employ highly sophisticated modes of transportation such as light aircraft and semi-submersible

[1] Hal Brands, *Mexico's Narco-Insurgency and U.S. Counterdrug Policy*, STRATEGIC STUDIES INSTITUTE (May 2009) (stating "[f]or much of the 20th century, Mexico's ruling Institutional Revolutionary Party (PRI) oversaw a system of "narcocorruption" that brought a measure of stability to the drug trade.9
The cartels provided bribes and kept violence to a minimum").

[2] E. Eduardo Castillo, *22,700 killed in Mexico drug war since 2006*, ASSOCIATED PRESS (April 13, 2010); The Department of Homeland Security itself projected a 40 percent increase in drug cartel-driven murders in Mexico in 2010. *Hearing on the Nominations of Williams and Harris Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (Dec. 10, 2009) (statement of Sen. Joe Lieberman).

[3] James McKinley, *Fleeing Drug Violence, Mexicans Pour Into U.S.*, N.Y. TIMES, Apr. 17, 2010 at A1.

submarines. Marijuana, heroin, methamphetamines, and cocaine traverse the border at high rates.[4]

At the time of this writing (spring 2010), DTOs are active in roughly 300 U.S. cities. As the Southwest Border Narcotics Strategy of 2009 notes, "[t]he reach of Mexican [DTOs] extends into our cities, suburbs, and rural areas, into our national parks, public lands, and even our prisons."[5] Some DTOs operate trans-nationally, establishing a measure of vertical command and control on both sides of the border. Others rely on a wide array of U.S. actors, including street, biker, and prison gangs to function as distribution networks. Drug-related crime has also seeped across the border. Homicides perpetrated by cartel-linked organizations have increased, and profit-motivated kidnappings have become so rampant that Phoenix, Arizona now has one of the world's highest kidnapping rates.[6] The National Drug Intelligence Center stated in its 2010 annual report that "Mexican DTOs constitute the greatest drug trafficking threat to the U.S."[7] The chairman of the Senate Committee on Homeland Security and Governmental Affairs has gone even further, labeling Mexican DTOs "a clear and present danger."[8]

The pervasiveness of DTOs throughout the U.S. and the multi-dimensional nature of DTO operations necessitate a response from law enforcement agencies (LEAs) at the local, state, and federal levels, and a host of federal actors tasked with national security policy, narcotics control, and diplomatic relations. Law enforcement authorities have strung together a number of successes against DTOs, and the State Department has spearheaded an ambitious $1.4 billion initiative to support the Mexican government's CN efforts.[9] However, recent calls for the deployment of the National Guard to the border by policymakers invite a detailed look at the legal regime governing the U.S. military's involvement in domestic CN operations.

The Law Governing the Use of Military to Support Civilian Law Enforcement

As a result of the dramatic rise in border violence and DTO infiltration into the U.S., policymakers have become increasingly interested in strengthening military support for drug interdiction efforts at the border. The U.S. Northern Command (NORTHCOM), established in 2002, has two primary missions: defense of the homeland and support of civil authorities.[10] Within NORTHCOM, Joint Task Force-North (JTF North) supports federal law enforcement in

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[4] OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY 1 (2009) (estimating that 90% of all cocaine in the U.S. transits through Mexico).

[5] *Id.* at 3.

[6] Over the last three years, there have been over 800 kidnappings in Phoenix. Home invasion rates, often related to the drug trade, have also spiked in places such as Tucson. *Drug Trafficking Violence in Mexico: Implications for the United States Before the S. Caucus on International Narcotics Control*, 111th Cong. (May 6, 2010) (statement of Sen. Diane Feinstein).

[7] Department of Justice's National Drug Intelligence Center, *National Drug Threat Assessment: 2010*, at 9 (2010) *available at* http://www.justice.gov/ndic/pubs38/38661/38661p.pdf.

[8] *Southern Border Violence: Homeland Security Threats, Vulnerabilities, and Responsibilities Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (Mar. 25, 2010) (statement of Sen. Joe Lieberman).

[9] An outline of the Merida Initiative, implemented in 2007, is available at: http://www.state.gov/p/wha/rls/rm/2010/140695.htm.

[10] Lisa Turner, Jeanne Meyer, and Harvey Rishikof, *Understanding the Role of Northern Command in the Defense of the Homeland: The Emerging Legal Framework—Authorities and Challenges*, *in* 43 HOMELAND SECURITY: LEGAL AND POLICY ISSUES (Joe Whitley & Lynne Zusman eds., 2008).

CN operations "within and along the approaches to the continental U.S."[11] To understand the military's role in combating DTOs along the SW border, it is necessary to examine the legal framework governing its domestic use.

The Constitution

Constitutional authority for the deployment of the armed forces is vested in both the President and Congress through an amalgamation of provisions in Articles I, II, and IV. The President's authority is derived from Article II, Sections 1 and 2, which require the President to "faithfully execute" the laws of the U.S. and to serve as the "Commander in Chief of the Army and Navy of the United Sates, and of the Militia of the several States," respectively.[12] The Constitution does not grant the President the explicit authority to use the military to execute the law.

Article I, Section 8 grants Congress the power to levy taxes "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions…."[13] Article IV requires the federal government to "protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence…."[14] Nearly a century after these authorities were codified as the supreme law of the land, Congress decided to put a finer point on how and when the armed forces could be used within the United States.

The Posse Comitatus Act

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.[15]

The legal prohibition of the use of the military for law enforcement purposes dates back to 1878, when the Posse Comitatus Act (PCA), 18 U.S.C § 1385, was enacted. The PCA was initially passed in response to public concerns regarding the role of the military during Reconstruction because of widespread suspicion that the military had tilted the 1876 presidential election toward Rutherford B. Hayes. More generally, the PCA represented the codification of the American public's wariness of the dangers posed by standing armies. The Act reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse

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[11] *Id.* at 46. JTF North's mission statement reads: JTF North provides military support to 46 law enforcement agencies, conducts theater security cooperation as directed, and facilitates interagency synchronization within the USNORTHCOM area of responsibility in order to anticipate, detect, deter, prevent, and defeat transnational threats to the homeland.
[12] U.S. CONST. art. II, §§ 1, 2.
[13] U.S. CONST. art. I, § 8.
[14] U.S. CONST. art. IV, § 4.
[15] Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985).

comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[16]

While it has been noted that the PCA by its own terms does not apply to the other military branches, courts have held that the prohibitions of the Act apply to the Navy and the Marines by implication or by executive act.[17] Courts have also found that the PCA applies only to soldiers in federal service under USC Title 10.[18] The National Guard, however, is subject to both state and federal authority. Operating primarily under Title 32 unless otherwise conscripted into federal service, the Guard is not subject to the PCA while serving under state authority.[19] As a result of this unusual regulatory scheme, Congress has largely relied on the National Guard, acting under state authority, to conduct CN operations along the border.[20]

Courts have declared that the purpose of the PCA is to preclude direct active use of federal troops in aid of the execution of civil laws.[21] The armed forces are trained to operate "under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation,"[22] not to enforce the law. Courts, therefore, have imposed specific limitations on the use of the military to supplement civilian law enforcement:

- [I]t must not subject citizens to the exercise of regulatory, proscriptive, or compulsory military power
- Iit must not amount to direct active involvement in the execution of the laws; and
- It must not pervade the activities of civilian authorities.[23]

Title X: Conscripting Armed Forces for the "War on Drugs" and the Erosion of Posse Comitatus

In furtherance of the "War on Drugs" initiated by President Reagan, Congress passed the Military Cooperation with Law Enforcement Officials Act in 1981 to "clarify the military's authority to assist civilian officials in the war on drug smuggling."[24] The Act prescribed how the Department of Defense (DOD) may support law enforcement CN efforts, including: providing

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[16] 18 USC § 1385.

[17] 141 A.L.R. FED. 271 *citing* U.S. v Ahumedo-Avendano (1989, CA11 Fla) 872 F2d 367, *cert den.* 493 US 830. Although the PCA prohibits army and air force military personnel from participating in civilian law enforcement activities, it does not directly reference the navy or marine corps, "this omission does not constitute congressional approval for navy involvement in enforcing civilian laws." *U.S. v. Chon*, 210 F.3d 990 (9th Cir. 2000).

[18] The 6th Cir. Court of Appeals has found as much by implication. In *Gilbert*, the Court found that Guardsmen participating in arrest were acting under state, rather than federal, authority. Although Guardsmen "looked and acted like soldiers," they were acting in response to directives issued by the state governor. Gilbert v. U.S., 165 F.3d 470 (6th Cir. 1999).

[19] *See* U.S. v. Gilbert, 165 F.3d 470 (6th Cir. 1999); U.S. v. Hutchings, 127 F.3d 1255 (10th Cir. 1997).

[20] 32 U.S.C § 112.

[21] The PCA "was enacted at end of Reconstruction for the purpose of limiting direct active use of federal troops by civil law enforcement officers to enforce the laws of this nation." U.S. v. Hutchings, 127 F.3d 1255 (10th Cir. 1997) *quoting* U.S. v. Red Feather, 392 F. Supp. 916, 922 (D.S.D. 1975).

[22] U.S. v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1975), *judgment aff'd*, 541 F.2d 1275 (8th Cir. 1976).

[23] Ronald Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 HOUS. L. REV. 1421 (2000) *citing* United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1988).

[24] Maj. Leroy Bryant, *The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?* 1990 ARMY LAW 3, 6 (Dec. 1990).

information to authorities collected during military operations;[25] providing military equipment to be used by state and federal law authorities;[26] and providing training.[27] In further amendments to the PCA in 1988,[28] Congress authorized DOD to provide additional indirect assistance to law enforcement. Congress has renewed this authority and the requisite funding to conduct operations under its purview annually ever since.[29]

Accompanying these grants of authority to DOD to conduct these operations were strict statutory limitations on the permissible degree of military involvement in law enforcement, precluding servicemen from becoming involved in active measures such as "search and seizure, and arrest, or other similar activities."[30] Upon a request by an appropriate federal agency, the military can provide assistance if the support rendered is a capability unique to the military and the unit providing the support gains training benefits from the mission.31 In an attempt to garner support from military elements opposed to the increased role in civilian law enforcement, Congress provided DOD with the ability to refuse a civilian LEA's request if it would "adversely affect…military preparedness,"[32] and required civilian authorities to reimburse the military for any assistance provided.[33] Directives promulgated to implement the 1981 amendments to PCA prohibit specific forms of MSCLEA, including:

- Interdiction of a vehicle, vessel, aircraft, or other similar activity;
- A search or seizure;
- An arrest, apprehension, stop and frisk, or similar activity; and
- Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.[34]

For 30 years, MSCLEA on the SW border has been conducted within this legal framework. Amendments to the PCA in 1981 and 1988, to facilitate the prosecution of the "war on drugs," substantially eroded the Act's central constraints. Yet neither the increased role of the military in combating drug trafficking, nor the military's amplified role in homeland defense and disaster relief in the wake of the attacks of September 11, 2001, have produced much public outcry. Many in Congress were cognizant of this attitudinal shift and even considered carving out additional exceptions to the PCA.[35] It seems that the long-held public suspicion of standing armies that led to the establishment of the PCA has largely dissipated—or else remained dormant so long as the military's role does not intrude too pervasively in civilian affairs.

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[25] 10 USCS § 371.
[26] 10 USCS § 372.
[27] 10 USCS § 373.
[28] All amendments from 1981 and 1988 codified at 10 USC §§ 371-381.
[29] Nat'l Defense Auth. Act of 1991, Pub. L No. 101-510, § 1004, as amended.
[30] 10 USC § 375.
[31] *See Understanding the Role of Northern Command*, *supra* note 10.
[32] 10 USC § 376.
[33] 10 USC § 377.
[34] DOD Directive 5525.5; *see also* Stephen Vina, *Border Security and Military Support: Legal Authorizations and Restrictions*, CONGRESSIONAL RESEARCH SERVICE (CRS) (May 2006).
[35] Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus* 12 WASH. U. J. L. & POL'Y 99, 138 (2003). In a congressional hearing in 2002, Sen. John Warner suggested that "the reasons for the PCA have long given way to the changed lifestyle we face today here in America." Vice President Biden, as a senator in 2002, advocated revising the PCA to give soldiers the power to make arrests. Joyce Price, *Biden Backs Letting Soldiers Arrest Civilians*, WASHINGTON TIMES, July 22, 2002 at 1.

The Military's Role in CN Operations Along the SW Border

In general, DOD conducts a wide range of CN activities, including: international drug smuggling detection and monitoring; information sharing; training; reconnaissance; analytical support; and infrastructure programs.[36] For exclusively domestic CN operations, however, DOD's participation, pursuant to the statutory scheme outlined in Part II, requires an appropriate federal agency to request its assistance. Department of Homeland Security (DHS) and Department of Justice (DOJ) component agencies most commonly make these requests.[37] The military's secondary role in domestic CN is highlighted by the 2009 Southwest Border Counternarcotics Strategy:

> [DOD] will provide support to these efforts in authorized areas, subject to the availability of resources, and at the request of appropriate Federal, State, local, or foreign officials with counterdrug responsibilities, if such support does not adversely affect the military preparedness of the United States.[38]

The geographic scope of MSCLEA along the border is expansive in width, but limited in depth. For example, military personnel who have been authorized to conduct detection, monitoring, and communication of surface traffic are permitted to do so only within 25 miles of the U.S. border when an initial detection occurs outside U.S. territory.[39] As U.S. Customs and Border Protection has primary responsibility for manning the 43 legitimate points of entry along the border, the military's area of operations spans the "thousands of miles of open desert, rugged mountains, the Rio Grande River, and the maritime transit lanes into California and Texas."[40]

Without any legal predicate to directly engage DTOs on either side of the border with kinetic force, the primary means of support provided by the military to LEA are "persistent air and maritime surveillance,"[41] including aircraft equipped with thermal optics, the operation of ground-based surface and air search radars,[42] and satellite surveillance. Two methods of military surveillance, basic aerial reconnaissance and thermal imaging, have produced vastly different substantive case law. The presence or absence of sensory enhancing equipment arguably controls whether certain surveillance methods, employed without a warrant, are permissible under the law.

Surveillance

Aerial Reconnaissance

Aerial reconnaissance "is an area in which the DOD has a tremendous capability edge over civilian agencies."[43] It is, therefore, likely that much of the military assistance provided to LEAs in CN operations will involve its use. DOD "serve[s] as the single lead agency of the

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[36] SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY, *supra* note 4, at 46.
[37] *F.Y. 2011 NORTHCOM and SOUTHCOM Budget Requests Before the S. Armed Services Comm.*, 111th Cong. (Mar. 11, 2010) (testimony of Gen. Victor Renuart, Commander of NORTHCOM).
[38] SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY, *supra* note 4, at 1.
[39] 10 USC § 374.
[40] SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY, *supra* note 4, at 13.
[41] *Id.* at 60. "JTF North will continue to provide persistent air and maritime surveillance, in order to detect and monitor the trafficking of illegal drugs."
[42] *Id.*
[43] HOMELAND OPERATIONS: AIR FORCE DOCTRINE DOCUMENT 2-10 at 32 (Mar. 21, 2006) *available at* http://www.fas.org/irp/doddir/usaf/afdd2-10.pdf.

Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States."[44] National Guard guidelines for conducting aerial reconnaissance authorize the surveillance of air, land, and sea for signs of "illegal drug activities."[45] The scope of permissible surveillance targets includes "suspected drug trafficking airstrips/drop zones/corridors or suspicious aircraft/watercraft/motor vehicles."[46] A myriad of surveillance techniques and vehicles are used in MSCLEA, including radar, unmanned aerial vehicles (UAVs), and aerial visual techniques including photographic reconnaissance.

Examination of existing case law on aerial reconnaissance employed without sensory-enhancing equipment reveals broadly-defined limits on its use. The Fourth Amendment contains two separate, pertinent clauses: (1) a prohibition against unreasonable searches and seizures and (2) a requirement that probable cause support each warrant issued.[47] The Supreme Court imposes a presumptive warrant requirement for searches and generally requires probable cause for a warrantless search to be "reasonable."[48] As with all surveillance techniques, the primary inquiries are whether such surveillance constitutes a "search" under the Fourth Amendment and, if a search has occurred, whether it is violative of the Amendment's "reasonableness" requirement. The standard test used by Courts, set forth in *Katz v. U.S.*, contains two prongs: (1) whether an individual had a subjective expectation of privacy; (2) whether that expectation was objectively reasonable.[49] Searches are typically conducted pursuant to a warrant obtained under procedures prescribed by Title III.[50] The "open fields" doctrine, however, is an exception to the warrant requirement for law enforcement-related searches and seizures, and governs permissible use of aerial photography by military assets.

As explained in *Oliver v. U.S.*,[51] the "open fields" doctrine holds that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[52] "Open fields," according to the Supreme Court, are lands usually "accessible to the public and the police in ways that a home, an office, or commercial structure would not be."[53] Much of the land abutting the southern border is public and therefore no warrant is necessary to conduct surveillance of it. However, the existence of "gatekeeper communities," or privately owned land whose owners facilitate both drug and human trafficking

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[44] 10 USCS § 124.

[45] NATIONAL GUARD REGULATION 500-2/AIR NATIONAL GUARD INSTRUCTION 10-801: NATIONAL GUARD COUNTERDRUG SUPPORT, [hereinafter NGR] Reg. 2-7, Authorized Missions (e)(1) at 6 (2008) *available at* http://www.ngbpdc.ngb.army.mil/pubs/10/500_2_10-801.pdf.

[46] *Id.*

[47] U.S. CONST. amend. IV.

[48] *See* Carroll v. U.S., 267 U.S. 132, 155-56 (1925) (probable cause is a "reasonableness" standard for warrantless searches and seizures); *see also* Hill v. Cal., 401 U.S. 797, 804 (1971) (stating that sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . .").

[49] *Katz v. United States*, 389 U.S. 347, 361 (1967) (Justice Harlan's concurrence lays out the test succinctly terms: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable").

[50] Title III of The Omnibus Crime Control and Safe Streets Act of 1968.

[51] In Oliver v. United States, 466 U.S. 170 (1984), the Supreme Court found that no reasonable expectation of privacy existed in an open field despite the fact that the field was a part of an individual's property. The individual grew marijuana in a secluded portion of the field. The Court held that no search occurred as society did not hold a reasonable expectation that open fields would be free from warrantless intrusion.

[52] *Id.* at 178.

[53] *Id.* at 179.

into the U.S., raises Fourth Amendment concerns and implicates the PCA if the purveyor of aerial surveillance is a military force operating under federal authority.

A Fourth Amendment exception to protections against warrantless searches, however, allows military assets to conduct aerial surveillance of gatekeeper communities within prescribed limits. Under the "plain view" doctrine, described in *California v. Ciraolo*, the fact that an area is within "curtilage" does not "itself bar all police observation," as the "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."[54] Under the "plain view" doctrine, one cannot maintain a reasonable expectation of privacy, and therefore invoke Fourth Amendment protection, when conduct is undertaken in the open view of others. In *Ciraolo*, law enforcement authorities, flying an aircraft at 1,000 feet above the surveillance subject, observed marijuana plants growing in an individual's backyard. The authorities photographed the marijuana plants with a standard 35 mm camera and, on that basis, obtained a warrant for the arrest of the property owner. The Court held that the warrant was validly obtained.[55]

As one author notes, "when the sensors employed are no more invasive or powerful than sophisticated visible-light photography, aerial reconnaissance is not a "search," whether accomplished by airplane or by helicopter, undertaken on a routine patrol or with a directed focus, or targeted at a domicile or a factory."[56] The fact that existing case law does not view basic aerial surveillance without sensory-enhancing equipment as a search puts such surveillance methods on safe ground under the Fourth Amendment, and also removes any concern with respect to their use by military assets.

Thermal Imaging

While the military's use of aerial surveillance by helicopter, fixed-wing aircraft, or UAV is largely free from any constitutional restraint along the border, the use of other surveillance methods, such as thermal imaging, are potentially problematic if they are aimed at gatekeeper communities or at U.S. citizens living in other areas along the border. Before its decision in *Kyllo v. United States*, the Supreme Court had "reserved judgment as to how much technological enhancement of ordinary perception . . . is too much."[57] In *Kyllo*, a National Guard member, accompanying a civilian law enforcement officer, used infrared surveillance equipment on a private dwelling to observe temperature disparities between the targeted house and surrounding dwellings. The use of thermal imaging led to a warrant and marijuana was seized in a subsequent search.[58] The Supreme Court held that:

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[54] California v. Ciraolo, 476 U.S. 207, 213 (1986); *see also* Kyllo v. United States, 533 U.S. 27, 32 (2001) (addressed *infra*) ("[W]e have held that visual observation [of a portion of a house that is in public view] is no 'search' at all ....").

[55] *See also* Dow Chemical Co. v. United States, 476 U.S. 227, 238 (1986). Aerial photography of an industrial compound from heights greater than 1,000 feet using a specialized mapping camera did not constitute a search. However, it might have constituted a search had it involved curtilage of a private home or had less commonly available technology been used. The Supreme Court in *Dow* held: "It may well be . . . that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public…might be constitutionally proscribed absent a warrant. But, the photographs here are not so revealing of intimate details as to raise constitutional concerns…."

[56] David Koplow, *Back to the Future and Up to the Sky: Legal Implications of "Open Skies" Inspection for Arms Control*, 79 Calif. L. Rev. 421, 491 (Mar. 1991).

[57] Kyllo v. United States, 533 U.S. 27, 33 (2001).

[58] *Id*. at 29-30.

> Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.[59]

The majority's analysis, authored by Justice Scalia, turned largely on the target of the surveillance, that is, an individual's home.[60] It is difficult to reconcile the *Kyllo* holding with that of *U.S. v. Knotts*, where the Supreme Court held that "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting their sensory faculties with such enhancement as science and technology afford[s] them."[61] The technology at issue in *Knotts* enabled police to track beeper signals planted on a suspected narcotics manufacturer, which allowed law enforcement to successfully follow the individual on public streets, where no reasonable expectation of privacy existed.[62] Moreover, the Supreme Court has also held that the use of a specialized mapping camera taking photos from a helicopter at 1,000 feet did not constitute a search.[63] However, as mentioned earlier, a critical aspect of the *Kyllo* decision was that the target of surveillance was a home, which always affords the individual residing there, at the very least, "the minimal expectation of privacy" that is entirely reasonable under the *Katz* standard.[64]

There are other possible exceptions to the warrant requirement that might allow the use of sensory-enhancing equipment on "gatekeeper" dwellings. Under the "border search" exception, "routine border stops and searches of persons, luggage, personal effects, and vehicles may be conducted without probable cause or reasonable articulable suspicion."[65] However, thus far, no court has considered whether an enhanced search of a dwelling that happens to lie in proximity to the border could fall within this exception. In light of the "routine" nature of typical border searches conducted at points of entry, this exception may be too narrow to apply to gatekeeper dwelling searches. However, several circuit courts have adopted an "extended border search" exception that might prove more applicable to warrantless searches of gatekeeper dwellings. Under this exception, a search is permissible if three conditions are satisfied:

- [T]here is "reasonable certainty" or a "high degree of probability" that a border was crossed;
- there is "reasonable certainty" that no change in the object of the search has occurred between the time of the border crossing and the search; and
- there is "reasonable suspicion" that criminal activity was occurring.[66]

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[59] *Id.* at 40.
[60] *Id.* at 30-52. Justice Scalia's opinion expressed concern regarding the ability of thermal imaging to reveal "intimate details" about the ongoings inside a person's home.
[61] U.S. v. Knotts, 460 U.S. 276, 282 (1983).
[62] *Id.* at 276.
[63] *Dow Chemical*, *supra* note 55.
[64] *Kyllo*, *supra* note 57, at 34.
[65] Georgetown Law Journal Annual Review of Criminal Procedure, *Overview of the Fourth Amendment*, 38 Geo. L.J. Ann. Rev. Crim. Proc. 3, 21 (2009).
[66] U.S. v. Cardenas, 9 F.3d 1139, 1148-53 (5th Cir. 1993) (extension of border search doctrine permitted beyond functional equivalent of border because criteria were met; court has defined "reasonable certainty" as "a standard which requires more than probable cause, but less than proof beyond a reasonable doubt"); *see also* U.S. v. Yang, 286 F.3d 940, 947 (7th Cir. 2002).

While the border search exceptions are more readily applied to searches of persons and property crossing the border at established checkpoints, the loosening of Fourth Amendment constraints where border crossings are concerned suggests that courts are at least willing to recognize the government's interest in maintaining border security, and offer law enforcement and military surveillance assets more flexibility in conducting warrantless surveillance, even where gatekeepers are involved.

Military Surveillance Along the Border: Measuring its Effectiveness in Combating DTOs

Arguably, border dwellers are well aware of the government's interest in combating DTOs and otherwise securing the borders, which weakens any claim that they had a reasonable expectation of privacy as to what occurs on their lands. Military assets conducting surveillance utilizing sensory enhancing technology should, nevertheless, defer to LEAs to seek and obtain a warrant where gatekeepers are the target of surveillance. Indeed, Guard guidelines put the onus on civilian LEAs to determine the legality of a proposed action:

Supported LEAs are responsible for obtaining warrants required for searches or for determining the need for searches, inspections, and observations that do not require warrants. This responsibility includes the determination of any potential legal restrictions upon the use of thermal imaging or sense enhancing systems.[67]

If a military asset conducts thermal imagery surveillance of a U.S. citizen in the absence of a warrant, case law suggests that a "search" will have occurred, triggering the restrictions of the PCA. However, there are two persuasive arguments against the military's continued use of enhanced surveillance techniques: (1) the military is no longer singularly capable of conducting sensory-enhanced surveillance and (2) border surveillance by military assets is, by and large, ineffective and costly.

The use of sensory-enhancing technologies is becoming increasingly commonplace among law enforcement agencies.[68] Indeed, with the dramatic post 9/11 transformation of civilian law enforcement capabilities and practices,[69] it is not unreasonable to conclude that the technological capabilities of civilian law enforcement will reach parity with the military's. Therefore, the constitutionality of using sensory-enhancing surveillance techniques without a warrant is not a unique concern to MSCLEA. If increased use of high-tech surveillance equipment is required to effectively combat DTO operations along the border, why not ratchet up spending geared towards hiring personnel and equipping civilian LEAs with that technology?[70]

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[67] NGR, Reg. 2-1, Legal Considerations and Requirements (e)(2), at 2, *supra* note 45.

[68] Charles Bloeser, *A Statute in Need of Teeth: Revisiting the Posse Comitatus Act after 9/11*, Federal Lawyer 50-MAY FED. LAW. 24, 29 (May 2003) (stating "America's surveillance technology was powerful and becoming more so even before 9/11. Months before the attacks, the Supreme Court reminded us that civil authorities already have thermal imaging technology that has been aimed at civilians' homes").

[69] The transformation of LEAs is epitomized by those reforms enacted in the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002) and the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638 (Dec. 17, 2004).

[70] The disparity in budget allocations for CN operations along the border between DoD and civilian LEAs suggests this is already a priority of the federal government: DOD's southwest border related funding allocation for 2010 in the amount of $94.9 million, a figure that pales in comparison to those federal law enforcement agencies tasked with border protection, drug interdiction, and prosecution of drug-related crimes. SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY, *supra* note 4, at 60.

LEAs are trained to mitigate the risk of encroaching on civil liberties unhindered by the potential application of PCA constraints.

Furthermore, MSCLEA along the southern border with respect to surveillance operations is often ineffective and costly.[71] As a result of the prohibitions on DOD's "active participation" in making apprehensions, the process by which surveillance operations lead to apprehension by LEAs is cumbersome. First, military surveillance assets must detect suspicious craft or individuals worthy of investigation, a process complicated by the fact that smuggled shipments are often successfully disguised as legitimate commerce.[72] Then the identified suspicious craft or individual must be intercepted. Since military forces are legally prohibited from apprehending suspected traffickers, the task of interception falls to LEAs. Monitoring DTO movements across the border through military surveillance accomplishes little if LEAs have inadequate resources to interdict traffickers—a frequent occurrence. Turning surveillance into interdiction requires seamless integration between DOD assets and civilian LEAs—integration that, even under the best of circumstances, is difficult to achieve. Moreover, the best of circumstances rarely occur in CN operations.

The problem of "flooding," in which "military surveillance aircraft, naval vessels, and observation posts identify and report more potential targets than law enforcement pursuit teams can possibly intercept," is commonplace.[73] Even if military surveillance assets are able to identify vessels or individuals carrying narcotics, there is simply not enough capacity to interdict every suspected trafficker. Because military surveillance personnel on CN missions are on short rotations, it is also difficult for the military to acquire institutional memory necessary to identify smugglers among legitimate traffic.[74]

Detention

One means of improving the efficacy of MSCLEA along the border in disrupting DTO operations is to authorize military personnel to conduct detention operations. While it has been argued that such operations do not contravene the PCA, as apprehending UDAs is more akin to "protecting our nation from foreign intruders"[75] than enforcing the law, this argument does not need to be scrutinized for purposes of this article. To circumvent the PCA's prohibition of military participation in active law enforcement, state governors need only deploy Guardsmen under Title 32. Case law supports the Guard's ability to make arrests in spite of the PCA.[76] Indeed, Guardsmen have arrested U.S. citizens without running afoul of the PCA or the Constitution when acting under state authority and empowered to make arrests under state law.[77]

With respect to federalized military forces, DOD guidelines stipulate that detention is only authorized when no LEA personnel are available and detainees are only to be held in

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[71] Maj. Eric Reid, Reconsidering Military Support to Counterdrug Operations Along the U.S.-Mexico Border (Nov. 12, 2009) (unpublished Master's thesis, U.S. Army Command and General Staff College).
[72] *Id.* at 72.
[73] *Id.*
[74] *Id.* at 73.
[75] Statement of former U.S. Border Patrol Supervisor David Stoddard *available at* http://www.renewamerica.com/columns/zieve/060713.
[76] Gilbert v. U.S., 165 F.3d 470 (6th Cir. 1999). The Circuit Court held that the arrest of individuals for growing marijuana crops by Kentucky National Guardsmen acting under Title 32 did not violate the PCA.
[77] *See id.*

custody until they can be handed over to an appropriate LEA.[78] Military personnel have participated in transporting foreign suspects to the United States to stand trial[79] and have held suspected terrorists in military brigs,[80] all without running afoul of the PCA. Indeed, of the legal issues raised by military detention operations along the border, those implicated by the PCA seem the least problematic. Even if detention operations constituted a PCA violation, the government's ability to continue to detain illegal aliens using military operations would not be derailed. In *Padilla ex rel. Newman v. Bush*, a federal district court considered it questionable as to whether the PCA is enforceable in a habeas corpus proceeding to secure release from custody.[81]

As it is difficult to accurately determine whether border crossings are made by those acting in furtherance of DTO objectives or those simply seeking economic opportunity, military detention operations would inevitably result in the conflation of illegal immigration and DTO operations, which would further complicate the ultimate disposition of those detained. For purposes of this note, detainees are put into three different categories: (1) DTO members with outstanding U.S. indictments and/or who were apprehended during the performance of criminal activity; (2) suspected DTO members or affiliates who are apprehended for illegally entering the U.S. at the border; and (3) illegal immigrants with no discernible connection to DTOs. Category (1) detainees present the simplest case, as they are either subject to prosecution by virtue of outstanding indictments against them or apprehended while committing criminal acts. Once arrested, these detainees will be subject to prosecution in Article III courts.

Category (2) detainees, who are apprehended while illegally crossing the border and suspected of being DTO affiliates, pose a greater challenge. If those detainees have not been caught while performing criminal activity other than crossing the border illegally, and in the absence of pending indictments, it seems unlikely that they will be criminally prosecuted. Moreover, although the U.S. and Mexico have a robust extradition treaty,[82] Mexican courts have an abysmal conviction rate and have struggled with maintaining penal institutions that can keep prisoners locked up.[83] The U.S. government's ambitious Merida Initiative allocates substantial funds for reforming the Mexican penal system by both instating an adversarial system of trial and shoring up security at Mexican prisons. However, these reforms are not moving expeditiously. As a result of these circumstances, Category (2) detainees will likely be treated as Category (3) detainees, or UDAs apprehended for crossing the border illegally.

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[78] *See* NGR, *supra* note 45. For purposes of limiting the scope of this study, this note assumes that the standard procedure of handing off detainees to an appropriate LEA will remain in effect during detention operations. The possibility of DOD establishing and/or operating detention facilities for UDAs seems far too politically infeasible, absent a dramatic change in factual circumstances, to merit consideration.

[79] U.S. v. Yunis, 681 F. Supp. 891 (1988).

[80] Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564 (S.D. N.Y. 2002), *opinion adhered to on reconsideration*, 243 F. Supp. 2d 42 (S.D. N.Y. 2003).

[81] *Id.*

[82] Extradition Treaty, U.S.-Mexico, May 4, 1978 31 U.S.T. 5059. *See also Randal Archibold, U.S. and Mexico Agree on Shift in Drug Trials*, N.Y. TIMES, Oct. 30, 2009 (describing how U.S. prosecutors have started extraditing Mexican drug smugglers to Mexico to face prosecution).

[83] U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Mexico*, (Mar. 11, 2010) (noting that conviction rates in criminal trials in Mexico are as low as 1-2% and reporting that over 100 inmates escaped Mexican penal institutions in 2009).

Contrary to popular belief, "illegal immigrants cannot simply be thrown out of the country."[84] UDAs are subject to a hearing before an administrative law judge. Pending deportation hearings, the federal government must provide housing for detainees.[85] The prospect of military assets participating in large-scale detention operations will put an enormous strain on the government's ability to accommodate detainees while administrative and criminal courts determine their ultimate disposition.[86] Moreover, the adjudicative proceedings along the SW border are already clogged, as the number of referrals, or recommendations for the prosecution of drug cases from LEAs, "have been increasing faster than actual prosecutions."[87]

The longer detainees are held without access to an adjudicative process, the more untenable the situation becomes. Human rights activists express outrage and the issue of detention is increasingly litigated in Article III courts. In *Zadvydas v. Davis*, the Supreme Court held that illegal aliens within the U.S. are entitled to the protection of the Fifth Amendment's Due Process clause, which "applies to all 'persons' within the United States."[88] If adjudication of detainee cases faces undue delay,[89] or if authorized deportations are hindered so as to result in the detention of UDAs beyond the statutorily-prescribed 90-day period,[90] it is possible that courts will extend habeas rights to UDAs.[91]

Conclusions and Recommendations

Accounts of the effectiveness of military CN efforts along the border vary. Proponents of Guard deployments to the border point to the measurable success of Operation Jump Start (OJS), a two-year deployment initiated in 2006 by President Bush that yielded tangible results.[92] And OJS did not run afoul of the PCA or the Constitution: the Guardsmen acted pursuant to Title 32, and the terms of the deployment were defined by memoranda of agreement between DOD officials and border state governors, and necessarily accorded with applicable state law.

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[84] J. Baker, *Letter to Lou Dobbs: How to Reverse Illegal Immigration*, 22 GEOILJ 373, 381 (Spring 2008).
[85] *Id.* at 382.
[86] *Id.* The author offers an extreme scenario: "[t]here is no jail space in the U.S. for even a few hundred thousand immigrant detainees. The…only option would be to create detention camps, as was done…during WWII for Japanese-Americans and more recently at Guantanamo for enemy combatants."
[87] The Transactional Records Access Clearinghouse analyzed drug cases in federal judicial districts along the SW border, finding that federal drug prosecutions increased 30% overall in the last 16 months. In Arizona, federal drug prosecutions jumped by 202%. Texas' Southern District experienced an increase in drug prosecutions of 53% over the same period.
[88] Zadvydas v. Davis, 533 U.S. 678, 694 (2001).
[89] Boumediene v. Bush, 128 S. Ct. 2222, 2275 (2008) (granting detainees held at Guantanamo Bay for roughly seven years the right to "prompt habeas corpus review").
[90] 8 USC § 1231 (A) In general. Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days.
[91] In *Zavydas,* the Court held that an illegal alien could not be held indefinitely within the United States without a right to due process. *See supra*, note 88.
[92] 176,000 UDAs were apprehended, 1,100 vehicles seized, 321,000 pounds of marijuana and cocaine were seized, along with 21,600 weapons. *Examining Preparedness and Coordination Efforts of First Responders Along the Southwest Border Before the H. Comm. on Homeland Security, SC on Emergency Communications*, 111th Cong. (March 31, 2009) (statement of Maj. Gen. Peter Aylward, Director, Joint Staff National Guard Bureau). DHS Secretary Napolitano, who, as governor of Arizona, called for a Guard deployment, has called OJS "very helpful and very effective." *FY 2009 DHS Budget Hearing Before the S. Comm. on Appropriations, SC on Homeland Security,* 111th Cong. (May 13, 2009).

However, opponents of additional military deployment to the border and/or increasing the military's role in combating DTOs can make a number of persuasive arguments on both legal and policy grounds. As discussed in Part IIA, the military's use of sensory-enhancing technology to conduct surveillance along the border risks running afoul of both the PCA and Fourth Amendment protections for U.S. citizens who are operating "gatekeeping" communities along the border. Moreover, LEAs have made dramatic leaps in their use of cutting-edge surveillance technology. This development undercuts one of the foundational justifications for MSLCEA identified by courts, that is, "improv[ing] the efficiency of civilian law enforcement by giving it the benefit of military technologies, equipment, information, and training personnel."[93]

With respect to the possibility of employing Title 32 Guardsmen for detention operations, experienced veterans offer substantive, policy-based criticism of military deployment to the border. For one, the military (whether federalized or not) is simply not the right tool for the job. A former Medal of Honor recipient recently put this argument in frank terms, stating that Guardsmen "are not trained for that duty and they didn't sign up for it."[94] While the author does not suggest that MSCLEA currently provided in combating DTOs along the border should come to an end, he cautions against additional Guard deployment, stating, "[c]ertain military skills are appropriate for drug-border use but soldiers chasing or confronting desperate civilians is not."[95]

Furthermore, large-scale military detention operations will inevitably ensnare UDAs with no links to the narcotics trade. Public outcry over the increasing length of detentions will trigger widespread litigation not dissimilar from that brought on behalf of detainees being held at Guantanamo Bay. The possibility of extending habeas rights to UDAs should not be overlooked in light of *Boumediene v. Bush*.

There are additional arguments against further MSCLEA along the border: (1) those operations detract from military preparedness, thereby contravening 10 USC § 376;[96] (2) deployment of military personnel for conducting surveillance are costly;[97] (3) procedural inconsistencies hinder the ability of LEAs to secure timely and adequate military support;[98] and

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[93] Bissonette v. Haig, *supra* note 15, at 1388.

[94] Maj. Gen. Patrick Brady, *Why the National Guard Should Not be Assigned to Border Duty*, AUSTIN AMERICAN-STATESMAN, May 7, 2010 at A11.

[95] *Id.*

[96] *Another Nail in the Coffin of the PCA*, *supra* note 35, at 114. In the 1981 and 1988 hearings preceding the amendments to the PCA, there was strong opposition from DOD to increased military involvement in CN efforts. Military commanders remained concerned that CN missions would detract from their readiness to fight. SecDef Carlucci argued that the military "should not become a police force, nor can we afford to degrade readiness by diverting badly needed resources from their assigned missions." *See also Reconsidering Military Support*, *supra* note 71, (describing how, in 1993, the Government Accountability Office (GAO) determined that flying hours for Air Force and Navy surveillance in support of CN operations held little training value—so little, in fact that flight crew members stopped participating in CN flights).

[97] GAO, *Drug Control: Heavy Investment in Military Surveillance is Not Paying Off* (Washington, DC: Government Printing Office, 1993). Some military assets, such as rotary wing transport and UAVs are relatively inexpensive and within the budgetary reach of federal LEAs. Other assets, particularly large multi-role aircraft, are costly to operate and maintain. After studying cost-effectiveness of CN efforts, GAO concluded that military surveillance is inherently expensive, particularly when costly, high-technology systems designed to detect sophisticated weapons systems in combat situations are used against DTOs.

[98] *Reconsidering Military Support*, *supra* note 71, at 74. "By law, JTF-North is constrained to support law enforcement solely with voluntary military forces.58 Because of this restriction, the composition and preparedness

(4) DTO activity is too multi-dimensional and pervasive throughout the U.S. for a military push at the border to have any meaningful impact.

Should policymakers choose to deploy additional military assets along the SW border, it is incumbent upon Congress and the President to facilitate the deployment by providing much-needed statutory flexibility and regulatory guidance. Several steps need to be taken to increase the effectiveness of MSCLEA along the SW border. The President can set the stage by declaring DTOs a national security threat. By making this designation, the President will bring the weight of Article II authority to bear along the southern border. This declaration, coupled with a congressional authorization to use force (AUMF) against DTOs, similar to that passed in the wake of 9/11,[99] would remove any concern regarding possible PCA violations and provide the military with a high degree of operational flexibility. Barring any dramatic change in factual circumstances, however, the issuance of either a presidential declaration or passage of an AUMF seems unlikely.

In the absence of either a presidential declaration or AUMF, Congress should further loosen the restrictions of the PCA by allowing the military to conduct detention operations along the border. National Guard personnel already undertake those operations under state authority and, while some might argue that this arrangement should assuage any fears regarding expansion of federal authority, the distinction between National Guard personnel who are acting under Title 32 and those responding to federal order under Title 10 is symbolic at best. After all, whether the commander-in-chief of forces conducting CN operations is in Washington, D.C., Tucson, or Austin should make little difference to the possibility of encroachment upon civil liberties.

Granting the military detention authority could increase the effectiveness of surveillance operations, as unity of effort is far easier to achieve when military surveillance assets are communicating with military, rather than LEA, interdiction assets. Abolishing the PCA altogether, while constitutional, will likely prove politically infeasible. Allowing military personnel, whether under federal or state authority, to conduct detention operations, on the other hand, merely serves as a logical extension of the PCA exceptions passed in 1981 and 1988. An amendment granting DOD detention authority, narrowly tailored to apply only to CN operations along the border, will maximize the effect of a military deployment geared towards combating DTOs.

Congressional foresight is also necessary to prevent aggressive detention operations from undoing CN strategy along the border. The War on Terror offers a stark lesson in the dangers of failing to articulate a detention policy at the outset of an operation. Congress must develop a robust, sustainable detention regime that provides a means of expedient disposition for all detainees, utilizing criminal proceedings, extradition to Mexico, or deportation. Developing a comprehensive detention regime would require an increase the capacity of both administrative and Article III courts, close collaboration with the Mexican federal government, and navigation of a host of logistical details—in other words, it is no small feat and therefore beyond the scope of this study.

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of military support units is unpredictable. Due to the congressional limitation for voluntary counterdrug MSCLEA, military support is driven by military appetite and not by drug control strategy."

[99] Like the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), this hypothetical legislation would contain no geographic limitations so as to enable full use of the military in a domestic setting.

The U.S. military has proven itself adaptive and resourceful throughout Operations Enduring Freedom and Iraqi Freedom. The Counterinsurgency Field Manual, issued in 2006, has redefined military operations, eschewing the traditional, kinetics and firepower approach for a population-centric strategy of winning the "hearts and minds" of indigenous populations.[100] In light of its proven adaptability, an argument can be made that the military can be put to good use in taking on the scourge of DTOs along the SW border. If large-scale military deployment is pursued, the burden falls to policymakers at both the state and federal level to facilitate CN operations by making the legislative adjustments necessary to provide clear authority and guidance to military personnel. If the military is the proper weapon to neutralize the threat posed by DTOs along the border, policymakers must wield it with prudence and precision.

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[100] *See generally* DEPARTMENT OF THE ARMY, THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 1 (The University of Chicago Press Edition) (2007).