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National Defense University

National War College

A Death on the Border
A Case Study in Process and Policy

LtCol James W. Lukeman, USMC

Course 5603
The National Security Process

Seminar J
Dr. Robert Levine

Faculty Advisor
Col Mark Pizzo, USMC

14 December 1998

Report Documentation Page

Form Approved
OMB No. 0704-0188

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1. REPORT DATE 14 DEC 1998		2. REPORT TYPE		3. DATES COVERED 14-12-1998 to 14-12-1998	
4. TITLE AND SUBTITLE A Death on the Border. A Case Study in Process and Policy				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) National War College, 300 5th Avenue, Fort Lesley J. McNair, Washington, DC, 20319-6000				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT see report					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 13	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Introduction

It was a little after six in the evening on the 20th of May 1997. Ezequiel Hernandez Jr. was herding his goats along the bluffs above the Rio Grande River near Redford, Texas, a remote border town of about 100 people west of Big Bend National Park. The good-natured high school sophomore tended his goats after school, and he always carried an old .22 rifle to protect his herd from the occasional wild boar or rattlesnake. For some reason that evening he fired his rifle twice at some bushes about 200 yards away across a ravine. He walked another hundred yards or so and raised his rifle to fire again.

At about the same time, Corporal Clemente Banuelos, United States Marine Corps, was leading his team of four camouflaged Marines into position before dark to observe an area of the Rio Grande known for its illegal drug traffic into the United States. His team was operating as part of Joint Task Force Six (JTF-6), a Defense Department multi-service organization assisting the U.S. Border Patrol by providing additional eyes and ears along the U.S.-Mexico border. While moving into position, Corporal Banuelos's team observed a man on horseback across the river in Mexico and then another man, this one with a rifle, on the American side of the river. Without warning, the man with the rifle fired two shots in the direction of the Marines. The Marines took cover and reported over the radio "we're taking fire." Corporal Banuelos maneuvered his team parallel to the man who shot at them to keep him in view as he moved along the bluff. Then Corporal Banuelos, 22 years old and responsible for the

lives of the Marines in his team, saw the man across the ravine raise his rifle and appear to aim in on Lance Corporal Blood, a team member. Corporal Banuelos aimed his M-16A2 rifle and fired one shot. The man with the rifle disappeared from view.¹

Ezequiel Hernandez Jr. had become an unexpected and unexplainable casualty of the war on drugs. Exactly what happened that evening will never be fully known. The Marines near Redford were one small part of the Department of Defense's support to the Justice Department's war on drugs. Their presence had been requested by the Justice Department, approved by the Department of Defense, and authorized by the Congress of the United States. Nobody expected that Ezequiel Hernandez would be killed that day, but the shooting set off a flurry of investigations, public statements, media interest, and policy reviews that provide an excellent case study in the process that shapes our national security policy. A study of the players involved in this case and the roles they played in the process is valuable for anyone who would participate in the development of national security policy.

Policy in Effect in May 1997

In 1990, with the Berlin Wall down and the Gulf War still over the horizon, the war on drugs was picking up speed. The military had been involved in that war for some time, primarily overseas helping the Drug Enforcement Agency to

¹ Details of the incident were described in several investigations. A key source document was the Report of Chairman Lamar Smith to the Subcommittee on Immigration and Claims of the Committee on the Judiciary of the House of Representatives titled "Oversight Investigation of the Death of Ezequiel Hernandez, Jr.", November 1998, U.S. Government Printing Office, Wash DC

interrupt the flow of drugs before they reached the borders of the United States. It seemed logical now to many in the Administration and in Congress that with the declining Soviet threat military forces could play a larger role in the counterdrug enforcement effort here at home.

The Posse Comitatus act of 1878 prohibits the use of the military in domestic law enforcement. However, the general consensus in the Administration and the Congress was that it did not prohibit military *assistance* to domestic law enforcement agencies such as the Drug Enforcement Agency (DEA) or the Border Patrol. The key piece of legislation that codified this consensus is Public Law 101-510, Section 1004 of the National Defense Authorization Act of 1991. This law authorizes the Department of Defense (DOD) to provide ten categories of support to any agency of the Federal Government with counterdrug responsibilities and to state, local, and foreign law enforcement agencies. Authority is also found in various portions of Titles 10 and 32 of the U.S. Code. These pieces of legislation provide the legal authority for the military to support domestic law enforcement agencies in counterdrug activities.

Between 1991 and 1997, policy development and implementation moved forward deliberately, smoothly, rationally, and quietly. DOD set up a department to coordinate drug enforcement policy and support, which issued several policy memoranda and documents during this period. Chairman of the Joint Chiefs of Staff Instruction 3710.01 of May 1993 authorized the military departments and combatant commands to approve operational support to domestic law

enforcement agencies. The National Security Strategy, National Military Strategy, and National Drug Control Strategies since 1994 have advocated and supported the use of military forces domestically in the war on drugs. By early 1997, the key players: the President, DOD and the Services, the Justice Department (which includes the Border Patrol and the Office of National Drug Control Policy), and Congress were all satisfied with the low-key character and positive results of the policy.

Military support to domestic law enforcement agencies had taken on many forms by May of 1997, but the bulk of support was in the area of surveillance and reporting. Military aircraft, radar, personnel, and equipment were used to watch high drug traffic areas, detect potential drug traffickers, and inform law enforcement agency personnel who were responsible for the apprehension and arrest of suspects. Other support included minor construction, equipment loans, transportation, intelligence, assistance with command and control networks, and training.

The Marines involved in the shooting near Redford were conducting ground surveillance of an often used illegal crossing of the U.S.-Mexico border.

The Shooting

Missions of the type Corporal Banuelos's team was conducting, known as listening post/observation post (LP/OP) missions, were fairly routine and had been conducted by various military units for several years. The Marine Corps assigned ground combat units to the LP/OP missions, and these units conducted

a limited amount of specialized training to prepare them for the mission. Corporal Banuelos's unit, a headquarters battery for an artillery battalion, had come from Camp Pendleton, California to Texas about two weeks earlier for what was to be a four week operation on the border. This operation was the first LP/OP mission that Corporal Banuelos and his team had conducted. The team of four Marines had been in the field for three days, hiding by day and occupying observation posts by night. They reported to and were supported by a tactical operations center, manned by more senior Marines from Corporal Banuelos's unit. The tactical operations center reported suspicious activity to the Marfa, Texas sector of the Border Patrol, which dispatched agents to investigate and apprehend suspects.

As part of their training, Corporal Banuelos and his men learned rules of engagement (ROE) that governed the use of deadly force. All Marines were armed during LP/OP missions, and the ROE described the appropriate use of weapons. Among other things, the ROE for LP/OP missions prohibited pursuit of suspects and required the use of the minimum force possible, but they were clear that deadly force was justified in self-defense or in the defense of the life of another. After Corporal Banuelos's team was fired on by Ezequiel Hernandez the first time, the tactical operations center gave permission to Corporal Banuelos to return fire, in accordance with the ROE, if threatened again. At 6:27 PM on 20 May, he did just that.

Immediate Actions

The deadly shooting ricocheted through all of the players involved in the policy process and brought immediate attention and unwanted scrutiny. The harsh light of critical examination brought out instinctive reactions from the fundamentally different organizations responsible for putting Corporal Banuelos and his Marines in Redford. In DOD, JTF-6 suspended LP/OP missions in the Marfa sector and the Marine Corps suspended all support to JTF-6. Both organizations immediately launched investigations into the circumstances of the shooting. The Justice Department more cautiously began its own investigation, and the Border Patrol distanced itself from the Marines who were supporting it. Congress was quiet with the exception of the Representative from the Congressional District where the incident occurred, Republican Congressman Lamar Smith, who happened to be on the House Judiciary Committee. Congressman Smith called for a full accounting of the circumstances and left open the possibility that Ezequiel Hernandez was the victim of a military or government run amuck. The State of Texas began a grand jury investigation to determine if a crime had been committed, and the media jumped on the story for its obviously controversial potential.

The stage had been set for a review of every detail of the policy that led to the unfortunate accident. The actions of most of the policy players over the next 18 months provide insight into a markedly different process than the one at work before the shooting.

The Process in a Crisis

With the media and Congressman Smith decrying the injustice of the shooting and looking for someone to blame, the players in the policy process began to take cover. Only the Marine Corps seemed ready to publicly accept responsibility for its role in the development and execution of the policy.

For the Marine Corps, there were two key issues. One was to identify what really happened that night; once the facts were determined, appropriate action could be taken. General Krulak, Commandant of the Marine Corps, appointed Major General Mike Coyne, called out of retirement for this task, to investigate the shooting. Major General Coyne was justifiably energetic in his pursuit of the truth, to the displeasure of some Marines who thought him too zealous. Major General Coyne would eventually find that Corporal Banuelos's actions were justified, but he found fault with the training given to Marines assigned to the LP/OP missions, blaming the chain of command for insufficient preparation for the task.

Another, more important concern of the Marines was the legal status of Corporal Banuelos. The State of Texas was conducting a grand jury investigation to determine if Corporal Banuelos should be indicted for murder. It seems that the criminal and civil liabilities of military personnel involved in operations in support of domestic law enforcement agencies was unclear. Because of the unresolved issue of liability, DOD suspended all ground reconnaissance missions

in support of domestic law enforcement agencies. This issue remains a key policy question.

While the Marines and the Texas Attorney General were investigating, the press was trying the case in public. The local press was understandably biased, and the national press also tended to paint a picture of the government secretly "militarizing" the border. Although the military operations were not secret, they were not publicized either. Locals were not informed that military teams were close by for fear that the word would get to the drug traffickers. Residents of Redford were shocked and angered to find out that armed Marines were observing their movements. Coupled with Ezequiel Hernandez's reputation as a fine young man, these feelings led to a belief that there was something more to the incident than was being reported. It made for a heart-wrenching, controversial story, too much for any paper to resist.

The negative press, unanswered questions of criminal liability, and suspension of Marine Corps participation placed pressure on DOD to pull the plug on counterdrug support. However, other powerful players in the policy process were interested in seeing that support continue. Other parts of the Administration--the Justice Department and Department of Interior--were in favor of the military support, and Congress still thought it was a good idea. What were the interests of these players and how would they influence the process?

The Justice Department, in the form of the Immigration and Naturalization Service, the Border Patrol, and the Office of National Drug Control Policy, has responsibility for preventing the flow of illegal drugs across the U.S. borders. The Department of the Interior, through the Bureau of Land Management, National Park Service, and Fish and Wildlife Service, is responsible for preventing the production of illegal drugs on federal land. All of these agencies are undermanned and underfunded to deal with the drug problem. DOD support was effective, the agencies needed the support, and the advice they gave the President was to continue to use the armed forces in the war on drugs. At the same time that the Justice Department was renewing its request for military support, its own investigation of the shooting quietly found no fault with any members of the Border Patrol, the organization with overall responsibility for the operation in Redford.

As for Congress, the constituencies of 532 of the 535 Members of Congress were not personally affected by the shooting in Redford. On the contrary, using military forces to fight the war on drugs sounded like a great idea to most of America. We'd already paid for the military, so it wouldn't cost any more. It was the perfect peace dividend, the opportunity to use the armed forces to make life better here at home. The Congress was convinced that the policy was sound. Just before the shooting, the House of Representatives passed a resolution calling for 10,000 additional troops to be used in support of the counterdrug operations on the border.

In the wake of the shooting, Congress quietly maintained its support for the use of military forces in the drug war. Congressional silence meant that the rhetoric of Congressman Smith, who used his position on the Judiciary Committee as a bully pulpit to voice his concern for justice, was the only Congressional voice heard. Congress had the power to change the law permitting military support to domestic agencies, but it chose not to, letting its inaction speak for itself. Changing the law would have been seen as being soft on drugs. When the shooting took place elsewhere, but the drugs might end up in the home district, it wasn't difficult to see the incident as the price of doing business in the war on drugs.

While DOD felt the Presidential and Congressional pressure to continue military support to the drug war, the problem of the criminal liability of Corporal Banuelos remained unresolved. The District Attorney for the 83rd District of Texas twice presented his evidence to Texas grand juries. On August 14, 1997, and again in August 1998, two Texas grand juries refused to indict Corporal Banuelos for the shooting. The Justice Department's Civil Rights Division conducted its own investigation as to whether any of the Marines had criminally violated Ezequiel Hernandez's civil rights. The Department presented its evidence to a federal grand jury in December 1997, and no indictments were handed down. The Hernandez family filed a civil tort claim against the Defense and Justice Departments in 1997, which the Departments settled on July 25,

1998, admitting no fault on the part of the government but promising payments to the family of about one million dollars.²

While the Texas grand jury investigations were being conducted, the Justice Department had prepared a case to assert that the Marines were immune to state criminal prosecution under the Supremacy Clause, Article VI of the Constitution. That clause has been interpreted in the past to mean that federal agents are immune from prosecution for actions taken while in the performance of federal duties that are honestly and reasonably believed to be necessary and proper³. The Justice Department's argument was not tested in this case, as Corporal Banuelos was found innocent of wrongdoing on the facts alone.

Conclusions

To date, the Department of Defense continues to support domestic law enforcement agencies in counterdrug operations; however, all ground reconnaissance missions, including LP/OP missions such as the one conducted near Redford, have been suspended. There has been no clarification of the civil or criminal liabilities of military personnel who participate in counterdrug operations. Only the Marine Corps found anyone at fault for the shooting near Redford. Other agencies responsible for the development and execution of the policy sidestepped and remained silent. The process, which boiled over in the heat surrounding the shooting incident, is again simmering on the back burner.

² "Oversight Investigation of the Death of Esequiel Hernandez, Jr.", 5-6

³ From a Memorandum for the Attorney General included in the "Oversight Investigation of the Death of Esequiel Hernandez, Jr ".

The process that produces national security policy involves many organizations with different motivations, responsibilities, and approaches. In a crisis these organizational characteristics are more vivid. Effective participation in the process requires a clear understanding and awareness of those differences. More importantly, policies produced by this process translate into actions executed by individuals. Ezequiel Hernandez and Corporal Banuelos became collateral damage in the war on drugs. Where national security is concerned, the consequences of policy decisions can be the difference between life and death.

The potential for an improved policy for military support to domestic counterdrug activities is greater now that the issue is off the skyline. For that improvement to be realized, the problems exposed by the Redford shooting need to be addressed. It seems reasonable that military personnel involved in these activities should continue to be subject to the UCMJ, but should not be subject to criminal or civil prosecution by the States. The services must understand that no other agency or organization are as interested or have as much at stake in this aspect of the policy. Military personnel must be protected from criminal prosecution by the states while they are in the performance of their duties. If this issue cannot be resolved, the days of military support to domestic law enforcement agencies are numbered.