

# Memorandum

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Subject

Use of the National Guard  
To Support Drug Enforcement Agencies

Date

July 24, 1989

To Margaret C. Love  
Deputy Associate  
Attorney General

From John O. McGinnis *JOM*  
Deputy Assistant  
Attorney General  
Office of Legal Counsel

You asked for our reaction to the Posse Comitatus Act discussion in the May 23, 1989 memorandum to you from Charles Saphos and Bruce Pagel of the Narcotic and Dangerous Drug Section of the Criminal Division. The memorandum suggests that the "Title 32 status" of a National Guard -- in which the Guard is under State control but is paid by the federal government, which is also subject to possible tort liability -- constitutes a status that is not covered by our April 4, 1989 opinion on the use of the D.C. National Guard for drug enforcement. We disagree. As discussed below, that status is simply a form of militia status, which our opinion concluded is not subject to the Posse Comitatus Act.

The Posse Comitatus Act prohibits the use of the Army or the Air Force of the United States for enforcing federal law except where expressly authorized by the Constitution or an Act of Congress. As we noted in our opinion, the Act applies to the National Guard when it is in federal service but not when it is acting simply as a state militia. The controlling difference between the militia and federal service statuses is that in the former status the Guard is under State control, while in the latter it is under federal control (i.e., it has been "federalized" under Title 10).<sup>1</sup> Title 32 status does not represent a third status for purposes of the Posse Comitatus Act; rather, it simply represents a form of militia status. As the Criminal Division acknowledges on page one of its memorandum, in Title 32 status the Guard "is subject to command and control by state Governors . . . ."

That Title 32 status involves the National Guard in its militia status is also made clear by Title 32's definitions. For example:

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<sup>1</sup> The D.C. National Guard presents a special case in this regard because the President controls it in both its militia and federal service statuses.

"Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that -- (A) is a land force; (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution; (C) is organized, armed, and equipped wholly or partly at Federal expense; and (D) is federally recognized.

32 U.S.C. § 101(4).<sup>2</sup> The definition thus expressly concerns the Guard as a "militia" and as trained and appointed by the States under the provision of the Constitution that "reserv[es] to the States . . . the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Art. I, § 8, cl. 16 (emphasis added). It is significant for current purposes that the statute thus refers to the constitutional provision that concerns the National Guard in its militia status and not the immediately preceding provision (art. I, § 8, cl. 15), which authorizes calling the Guard into federal service.

The fact that the Guard is federally funded and equipped in its Title 32 status does not put it into federal service for purposes of the Posse Comitatus Act; only a "federalizing" order under Title 10 can do that. Indeed, the constitutional provision concerning the Guard in militia status authorizes such federal support by providing that the federal government may "organiz[e], arm[], and disciplin[e]" the Guard when it is in militia status, while providing further that the federal government may "govern[]" the Guard only when it is in federal service status. Art. I, § 8, cl. 16.

Finally, we comment briefly on the statement (at the bottom of page two of the Criminal Division memorandum) that the staff of this Office orally advised Criminal Division staff that the analysis in our April 4, 1989 opinion would not apply to the use of the National Guard in Puerto Rico or the territories for drug enforcement. The statement is incorrect. Neither our opinion nor any other work by this Office have addressed that question, and we so advised Criminal Division staff.

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<sup>2</sup> The definition of "Air National Guard" is identical except that it refers to "air force" rather than "land force." See 32 U.S.C. § 101(6).