



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

August 17, 1989

Honorable Al Luna
Chairman, Committee
on Science and Technology
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78769

LO-89-66

Dear Representative Luna,

You ask whether the Texas National Guard has authority to cooperate with federal customs agents in spot inspections of cargo along the border between Texas and Mexico.

The Texas Army National Guard and the Texas Air National Guard are active state military forces. Gov't Code § 431.001(3), (4); see generally Gov't Code, ch. 431, subch. C (dealing with the Texas National Guard). They are also reserve components of the United States Departments of the Army and the Air Force. 32 U.S.C. § 102. See generally U.S. Const. art. I, § 8, cl. 16 (the militia clause); Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181 (1940). Congress may order National Guard forces into active federal duty whenever they are needed for national security. 32 U.S.C. § 102. The governor is commander-in-chief of the state military forces and has full authority over the state military forces, except when they are called into actual service of the United States. Tex. Const. art. IV, § 7; Gov't Code §§ 431.002, 431.004.

A federal statute enacted in 1988 specifically permits the participation of National Guard personnel in civilian drug interdiction and law enforcement operations. National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 1105, 102 Stat. 1918, 2047 (1988). Title XI of the act authorizes the secretary of defense to provide states with federal funds to pay the expenses of National Guard personnel assigned to the operations. Id. Section 1105 provides that National Guard personnel can participate in such operations only while acting under state authority.

See generally Posse Comitatus Act, 18 U.S.C. § 1385 (prohibiting use of military personnel in civilian law enforcement activities except where specifically authorized); 32 C.F.R. § 213.10(a)(2) (stating that National Guard members are exempt from restriction of Posse Comitatus Act when not engaged in federal service).

Under the National Defense Authorization Act each state governor may submit a funding request to the Secretary of Defense specifying how National Guard personnel and facilities will be used in drug interdiction activities. A Texas plan was approved for the period from November 1, 1988, through September 30, 1989. Although the plan is not available for public inspection, the governor's office has informed us that the plan provides for the type of activity you ask about. Any questions about the state plan should be directed to the governor's office.

In summary, there is authority for the Texas National Guard to assist customs agents in drug interdiction activity. Whether any particular activity comports with the law is a fact question that cannot be resolved in the opinion process.

Very truly yours,



Sarah Woelk, Chief
Letter Opinion Section

SW/lcd

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