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The Overlap of Military and Police in Latin America

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Introduction.

What is military, what is police, and what is civilian? These three concepts are not as distinct as we might suppose, especially in Latin America where pieces of United States foreign policy have hinged on the differences. It was an early postulate of U.S. political thought that government monopoly of armed force prompted tyranny and that a standing army was therefore dangerous to liberty. 1 Upon this axiom, the founding fathers of the United States were scrupulous in creating a system that would hamper the organization of central government force and would preserve civilian control of military assets. Wariness regarding the potential for tyranny by or through military establishments is visible in the United States Constitution's explicit prohibition against quartering soldiers in private homes, in the Second Amendment right of the individual to bear arms, and in the distinction between congressional power to "provide and maintain a navy" but only to "raise and support armies." 2 More than a foible of the framers, military arrogation of political power has been seen as a threat to individual liberty throughout the history of the United States.

The same principle has colored United States' relations with Latin American countries. Security assistance legislation expressly restricts United States military assistance to civilian police organizations, while parallel legislation encumbers the expenditure of aid to civilian police organizations to the extent that it might end up being spent by a foreign military organization. 3 This legislation reflects more than a generalized distaste for the military. It obeys a corollary belief that much of what is wrong with Latin American politics can be traced to the tyranny of military-controlled governments. Unfortunately, a gap has existed between the validity of the general principle (civilian control over the political power of the military) and knowledge regarding the specifics of the civil-military environment in other countries. Much of the mismatch between North American and Latin American understandings of the civil-military distinction can be traced to social tradition often reflected in provisions found in national constitutions. These include the establishment of national police forces, the difference in code (statutory) versus English case-precedence juridical histories, or the cultural respect owing to police officers by the society at large. Not only do organizational, psychological and legal overlaps exist between what is "military" and what is "police" in Latin America, but the nature of this overlap varies from one Latin American country to another. Police powers and obligations, jurisdictions, immunities from prosecution, development of military legal corps, special laws related to narcotrafficking and subversion, and the constitutional foundations of military and police authority all bear on the logic of the military-civilian distinction made in United States foreign policies in the region.

Posse Comitatus.

In recent years, United States debate about military intrusion into civilian powers within the

United States has focused on a previously obscure statute, the Posse Comitatus Act. Written in 1878 in response to perceived misuse of the military during the post-Civil War Reconstruction, the Act remains viable today. A brief review of the United States' Posse Comitatus Act serves as a referent for comparing the variety of constitutional and statutory provisions controlling military behavior in Latin American countries. It states, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined no more than $10,000 or imprisoned not more than two years, or both." 4 As understood, the Act provides no exception for use of the military just because the requestor is a civilian federal agency, say the FBI. The Act applies to personnel assets only, not equipment or facilities, and it is not regarded as having any extraterritorial application. 5 There exist constitutional exceptions, statutory exceptions, and a "military purpose" exception. Actions taken under the inherent right of the United States Government to ensure the preservation of public order and the execution of federal functions, which have their bases in the Constitution, do not violate the Act. Use of federal troops for the protection of federal property does not violate the Act. Civil disturbance statutes authorize the use of military personnel to enforce civilian law where the state has requested assistance, where the President considers it necessary to enforce federal laws, or when the President considers it necessary to protect civil rights. 6

Nobody has been convicted under the Posse Comitatus Act. However, evidence obtained as a result of the Act's violation has on occasion been ruled inadmissible (excluded) for purposes of prosecution. More important as a legal deterrent perhaps is the possibility that soldiers who violate the Posse Comitatus Act will be found to have acted outside the scope of their employment and are therefore vulnerable to being found personally liable for their actions in a civil suit.

During the early 1980's, United States counternarcotics strategy called for increased use of U.S. military assets, and the prohibitions of the Posse Comitatus Act were revisited. Legislation was enacted clarifying the permissible use of military assets and organizations in the context of law enforcement, and especially in counternarcotics law enforcement. These statutes are generally referred to as the Military Cooperation with Civilian Law Enforcement (CLEO) Statutes. 7 More recently, Congress directed the armed forces, to the maximum extent possible, to conduct training exercises in known drug-interdiction areas. 8 It also expanded authority to assist foreign police and military in counternarcotics efforts. The direction of this suite of clarifications about the Act has been to ratify a range of military involvement in civilian law enforcement. Certain activities by military personnel are specifically forbidden (again, with other statutory exceptions). 9 Search and seizure, arrest or detention, surveillance of suspects, and the use of military personnel in an undercover capacity are all prohibited. Nevertheless, the analytical framework that courts use to decide if an individual's rights have been infringed (through violations of the proscription against using the military to execute the laws) orients on institutional intent. Courts will consider whether civilian law enforcement agents make direct, active use of military personnel to execute the laws, whether the use of any part of the armed forces pervades the activities of civilian law enforcement agencies, or whether military personnel subjected citizens to the exercise of improper military power. In short, the courts have given considerable leeway to the potential

use of military assets in domestic law enforcement activities.

Congress produced the Posse Comitatus Act in response not so much to the abuses by military commands but to supposed abuses of post-Civil War Reconstruction civilian authorities. These officials, often from the North, used locally available federal military power to enforce Black voting rights. Meanwhile, in the North, troops were too often used to quell labor riots. Revelations during the 1970s about the use of military intelligence personnel to investigate civilians inside the United States (mostly on college campuses) influenced more recent legislation. 10 However, since the enactment of the CLEO statutes there have been few occasions in which complaints have been levied against the use of military assets in a non drug trafficking case. Until an abuse of the statutes drags military involvement in law enforcement beyond the effort to halt illegal drug trafficking, the federal courts are likely to be sympathetic to a liberal interpretation of the Posse Comitatus Act. Importantly, U. S. military commanders faced with civil assistance missions inside the United States often display profound concern about whether or not the actions of their units might violate the Posse Comitatus Act. They probably do not derive their concern from an understanding of the case or legislative history of the Act, but instead from intuition about the appropriate role of military force in the context of U.S. political culture.

At the time of the writing of the U.S. constitution in the late 18th century, the thousands of small communities that constituted the proto-nation of North Americans depended on the local militia for physical security and not on a national army. They depended on the local jury for law enforcement, not on a national police. The constitution reflects this condition throughout, but it also asserts some federal government responsibility for domestic tranquility, as called for in the document's preamble. Article 4, Section 4, states that the United States shall protect each [state] against invasion; and on the request of the state legislature (or of the state executive if the legislature cannot be convened) against domestic violence. However, even though the constitution provides room for the use of federal force under special circumstances of internal violence, it was not until this century that the Supreme Court of the United States "laid claim to such a power." 11 Until this century, police powers were commonly understood to be among those retained by the various states and the people. Those powers included not only the administration of criminal justice, but also the complete range of matters with which we might today define cultural independence. 12 Criminal penalties in some areas of New England included those for a wife's scolding a husband, or for inappropriate dress, or for having possession of playing cards. Such Puritan strictures may seem odd in today's America, but they are not uncommon worldwide. The clerical fundamentalist societies of the middle east, or even indigenous communities in the Americas are modern examples in which "police" power reaches well beyond management of violence. Eighteenth Century North Americans understood the connection between the application of force to regulate violence and the imposition of force to change (or maintain) social norms. At the time of the North American constitutional debates, the threat of a standing national army to local cultural independence seems to have been intuitively associated with the idea of police powers. Today, the great institutional distance between local police forces and the U.S. Army is an historical result of the conceptual intimacy between military and police power in eighteenth century North America.

Thus, a curious historical relationship exists between organizational development and political philosophy in terms of the overlap between what is essentially military and what is police. Had the United States constitution provided more amply for a standing federal army, and had that army been applied in greater measure to enforce internal laws, the North American understanding of "police" might be far different than it is today, and it would probably be closer to that of most Latin Americans. At the time of the writing of the U. S. constitution, federal government power was associated with the threat of tyranny within the same axiom that associated military power with tyranny, but as North American political culture has evolved, it appears that the fear of central government tyranny has faded somewhat, but the axiom of military tyranny remains. Today, as North Americans look south, the history of Latin military governance reconfirms fear of military tyranny. Accordingly, North Americans consider the appropriate societal role for military institutions one of complete subordination to civil authority. The "police," associated semantically as civilian and perhaps subconsciously as local, have enjoyed greater popular acceptance from a North American perspective. Understandably, political culture in countries where police responsibilities have been traditionally assigned to military organizations confuses North American efforts to categorize the intrusion of things military into things civilian.

There are several discernible, interrelated subject areas that can guide the distinction between what is civilian and what is not. Taken together, the examples used below suggest the weakness of policy based on unstudied military-police-civilian categorizations.
Latin Constitutions.

As with other dimensions of Latin American study, it becomes apparent from a survey of constitutional provisions regarding the military that the countries of Latin America are similarly different from the United States and distinct one from another. The Colombian Constitution, adopted in 1991, is one of the world's more recent. Colombian constitutional expression reflects basic political concerns and records the results of legislative compromise. It is also the legalistic backdrop for actions and opinions of the Colombian high court. 13 Explicit consideration of the security forces in that constitutionis translated as follows:

The security forces shall consist exclusively of the military forces and the National Police.

The military forces have as their essential purpose the defense of sovereignty, independence, the integrity of the national territory, and constitutional order.

The National Police are a permanent armed civilian force administered by the nation; their essential purpose is to preserve the conditions necessary for the exercise of public rights and freedoms and for ensuring that the inhabitants of Colombia live together in peace.

Members of the security forces [police and military] may not exercise the right to vote as long as they are in active service, nor may they participate in the activities or debates of political parties or movements.

Only the government may introduce and manufacture arms, ammunition, and explosives. No one may possess them or bear them without permission from the appropriate authority.

The members of national security organizations and other armed official bodies of a permanent nature that were created or authorized by law may bear weapons under the government's control in accordance with the principles and procedures established by the latter. 14

The National Police are explicitly a civilian force and not military. They are, nevertheless, a subordinate entity within the Ministry of Defense, a ministry that recently became headed by a civilian minister. 15 In the 1950's the National Police had been located under the Interior Ministry, but the Colombian legislature felt that the force had become too politicized, and, to better maintain the apolitical professionalism of the police, returned the it to the Ministry of Defense. In 1993 a commission established to reform the nation's police forces decided after extensive debate that the National Police should remain under the Ministry of Defense for the same reason it was moved there. The commission, however, plainly understood the mismatch in missions that was generating so much public attention to the hierarchical dependence of the police. The military forces were obviously involved in what was best characterized as police business. A March 1993 Bogota newspaper article reported on the basis of government-provided information that 70-80% of the guerrillas who had been captured during the preceding three months had been processed under by-name arrest warrants. 16 Although not stated in the report, it could be inferred that either the National Police was to be credited with the lion's share of successes against the guerrillas, the military was performing civil arrest functions, or that there were legalistic aspects of criminal procedure left un-explained. The first possibility is to be rejected outright. No one in or out of the National Police claims that the National Police is the principal counterguerrilla force. The second and third possibilities are closer to the mark. Colombian penal law and theory understand specific steps in initial processing of a criminal suspect that we can loosely compare to the steps of initial detention and questioning, arrest, booking, and arraignment in the vocabulary of most United States criminal jurisdictions. Only civilian police can effect an arrest made under a warrant in Colombia, but there is some leeway, given the rights of citizens in general to effect arrests, between initial detention and formal arrest. While specifics of the operational habit of the Colombian military may be legalistically validated, it is agreed that the sweep of law enforcement activities leading to arrests and convictions should be the domain of the police, not the military. Furthermore, the enabling of by-warrant arrests often requires information gathered via surveillance means permitted only under court approval. If the military is involved in many by-warrant arrests, there exists a strong suggestion that the military is also closely associated with citizen surveillance.

The Guatemalan constitution states the basic mission and organization of the Guatemalan Army (armed forces) and asserts that it is singular and indivisible, inherently professional, apolitical, obedient and non-deliberative (meaning no public political debate). 17 Members of the armed forces are constitutionally denied suffrage and the right to collective petition. These provisions define their military status. The Guatemalan National Police, unlike the Army, is not expressly covered in the constitution. We can interpret absence of the National Police as a separate constitutional subject as evidence of the conceptual distance between military and police activities in the minds of the constitutional framers. A separate article addressing cooperation of the Army in questions of internal order asserts that the Army will lend its

support in emergencies or public calamity. Thus the potential for military involvement in police activities is expressly left open in the Guatemalan constitution, but use of the military for the furtherance of internal order is, by constitutional interpretation, extraordinary.

The Peruvian constitution creates distinct Armed Forces and Police Forces. The Armed Forces include the Army, Navy and Air Force while the Police Forces include the Civil Guard, the Investigative Police and the Republican Guard. 18 In the Peruvian case, constitutional provisions make rank, pay and promotions of the Armed Forces and Police Forces coequal and place the personnel of both services under the scope of the Code of Military Justice.

Constitutional "States of Exception" also contribute to the operational civil-military relationship. The constitution of the Republic of Guatemala provides for certain states of exception in which public order laws are put into effect and during which the government suspends various constitutional protections. For instance, in case of need, detentions can be made without a written order by competent authorities, including the army. The public order law and the constitution mention five states of exception as follows:" (1) state of prevention (2) state of alarm (3) state of public calamity (4) state of siege(5) state of war. No Guatemalan president has claimed a state of exception since 1983.

Colombia's constitution contemplates three states of exception--the state of war, the state of serious internal disturbance, and the state of emergency. The Colombian president "may declare a state of internal disturbance throughout the republic or in part of it for a period not to exceed 90 days. That period may be extended for two equal periods, the second of which requires prior approval by the Senate of the Republic." 19 The four articles of the Colombian constitution that deal with states of exception provide extensive and specific controls and limitations. The article dealing with internal disturbance states specifically that in no case may civilians be investigated or tried under the Code of Military Penal Justice, but it has not been interpreted to prohibit the application of military investigative resources in support of the civil criminal code. At the time of this writing, a legislative bill was being offered to end the use of the military in judicial police duties. 20

The relevant chapter of the Peruvian constitution provides for two states of exception--the state of emergency and the state of siege. 21 The Peruvian constitution specifies constitutional rights that may be suspended under the state of emergency and asserts, "In a state of emergency, the Armed Forces assume control of internal order when the President of the Republic so disposes."

Argentina's political constitution provides for only one state of exception, the state of siege (estado de sitio) that also has the effect of suspending constitutional guarantees. 22 Though it does not provide a graduated set of states of exception, it specifically allows a state of exception to be limited to a province or territory.

In each of the above cases, constitutional fundamentals presuppose executive use of military forces during periods of domestic turmoil. At the time of writing this essay, two of the four countries highlighted, Colombia and Peru, had a state of exception in effect.

Special terrorist and narcotics trafficking laws can also influence the civil-military relationship, though perhaps only marginally. In Colombia, where kidnaping for organizational financing is widespread, one tack in antiterrorist legislation has been to make negotiating with kidnappers for the payment of ransom illegal. Local analyses show that some 40 percent of more than a thousand recently reported kidnapings seem to have been purchased out. 23 The effect of the law on ransom payment is uncertain, but enforcement of the law against kidnaping victims' relatives carries the potential of dragging military investigative resources onto more civilian territory. Special drug laws can restrict civil constitutional protections in certain circumstances such as allowing the appropriation of properties under "ill gotten gains" provisions. The Colombian government has empowered judges to make final determinations about property confiscated from drug traffickers rather than military or police commanders. 24 In Argentina, confiscated properties suspected as tied to drug profits apparently never devolve to military entities since the military is not officially engaged in counterdrug law enforcement.

Police powers and obligations.

The question of legal arrest authority is also central to understanding civil-military relations. To explain police powers, it is convenient to differentiate between the obligation and the right to make an arrest. As in most western countries, if a Guatemalan civilian discovers the whereabouts of a fugitive for whom an extant arrest warrant exists, he has the right to apprehend the fugitive and take him to the nearest authority. However, to carry out this arrest, the citizen is encouraged to obtain the force necessary by informing and using local government authority. The same is true in cases involving delinquents found in flagrante delictu. In any case, the civilian has the right to proceed, but has no obligation to proceed. Authorities charged with preserving public order, on the other hand, have a standing obligation to conduct the arrest or detention of a fugitive either in response to an arrest order or if a suspect is found in flagrante. The police have no right to overlook the commission of a crime. A Guatemalan Army officer is in almost the same position as a common civilian regarding the right to make arrests and detentions, unless he is serving in a police capacity either as a member of the Policia Militar Ambulante (Mobile Military Police, a military unit specifically empowered and obligated by law to make criminal arrests) or when he is assigned as a leader in one of the other national police forces. The fact that all citizens have the right to make an arrest, combined with the practical condition that the military officer will generally have the physical means to complete an arrest (possession of a firearm or control of armed troops) often induces a moral obligation to pursue a criminal, even absent specific legal obligation. It is a legal irony that the one Guatemalan Army unit with the theoretical obligation to pursue the guerrillas (defined as delinquent terrorists) is the Mobile Military Police. The Mobile Military Police is the only major military command not generally assigned direct counterguerrilla missions.

In the United States, statutory law of the individual states addresses the question of police power and obligation. This is perhaps more so since the legislative movement in many states during the 1970s and early 1980s to limit criminal law to statutes and to deny the application of English common law. The police officer is obligated to make arrests ordered by a court in the form of a warrant. Usually, police are also obligated by state statute or internal regulation

to arrest violators. The civilian has no obligation to make an arrest any time, and he does not have the authority to arrest with a warrant. However, most states empower the police, under the same theory as the posse comitatus, to order civilians to render the assistance necessary to make an arrest. This can mean, for instance, the commandeering of an automobile or the making of a phone call. The United States military officer has no obligation beyond that of any other citizen to make an arrest and has no special authority (with the possible exception of situations involving the requested deployment of federal troops to quell a domestic disturbance). Probably most important, however, in comparing the condition of the United States military officer with a military officer from many of the countries of Latin America, is the right to carry and conceal firearms and the right to use that force as necessary to effect an arrest. In the United States, military officers (except a very limited number of military law enforcement personnel) holds no special right to bear or conceal firearms that would differentiate them from the standard citizen. Thus, the military officer in the United States is no better empowered than any other citizen to effect an arrest against resistance. No heightened sense of obligation to enforce domestic law is visited upon the U.S. military officer. In many Latin American countries, the individual military officer is empowered by the right to carry a weapon. The consequent heightened sense of obligation to enforce the law becomes not only individual in nature, but is also generally adopted as an institutional ethic, even if unstated.
Immunities from prosecution, competence of courts.

If the military officer cannot be prosecuted for having exercised his will beyond the boundaries of the civilian legal regime, his impunity makes moot any assessment of basic laws intended to distance the military from domestic matters. The legal competence of civilian courts to try military members bears on the issue of impunity, but it is a mistake to presume that a civilian court would be necessarily more likely than a military court to produce a just conviction. In addition, cases in which a military institution is likely, for whatever reason, to protect the accused also present problems of judicial security and investigative access. Such difficulties could far outweigh the simple character of the court as civilian. These issues aside, we can easily overdraw differences of judicial competence between military and civilian first-instance courts. Interwoven appeals systems and selective application of civilian versus military penal codes reduce the independence of military courts in most Latin American legal regimes. In Guatemala, for example, only a military court will have competence over cases involving a military member (with some exceptions), but if the case involves a violation of the civil code, the court tries it under the provisions and procedures of the civil code. In other words, the military court uses the civil code with respect to common crimes and uses the military penal code only for military crimes.

Guatemalan military courts are competent to hear all cases involving military members. If an accused is in the process of being judged by a civilian court and the court determines that he is a member of the military, the court must immediately freeze proceedings and remit all actions to the proper military tribunal. This limitation on competence is often referred to in Spanish as the "fuero de guerra" or "fuero militar."

If a military tribunal is processing an accused and it becomes clear that he is not a military member, the tribunal must immediately remit to the proper civil jurisdiction. There are some

cases, usually involving a military commissioner (a civilian empowered to represent the army in certain official functions such as recruiting), in which each of two courts, one military and the other civil, find the other competent and refuse to hear the case. In such an instance, the supreme court decides the question of competence. This is a typical pattern throughout the Americas. Due in part to full dockets, courts seek to deny rather than exert competence.

There are eight first-instance trial courts (tribunales militares) in Guatemala that hear criminal cases weighing against members of the military. There are also seven civilian appeals court jurisdictions that encompass the jurisdictions of the eight military tribunals. The seven appeals courts are called "privative military tribunals" whenever one of these courts forms itself to hear an appeal regarding a common crime committed by a military member. The court is called a "courts martial" when it receives an appeal involving a purely military crime. Actually, these seven courts are seven of the eleven civilian courts at the appeals or second-instance level of the civilian court hierarchy. When these seven courts meet either as privative military tribunals or as courts martial, two military officers are added to the normally three-member civilian bench. These two officers, or "vocales" are never lawyers. They are usually career line officers appointed to be members of the appeals court as a standing extra duty usually lasting one year. The officers have an equal right to speak and vote with the civilian justices. However, they rarely have the legal experience to follow criminal proceedings in court, and they are a minority on the court. Still, it is common for civilian justices, although legal professionals, to give deference to the opinions of the officers regarding aspects of military life and standards of which the civilians may be little aware. This is in accordance with the spirit of the legislation that provides for a partially military composition of these courts to lend an understanding to the court regarding motives and circumstances of delicts committed by members of the military. Both the courts martial and the privative military tribunals are subordinate to the jurisdiction of the Guatemalan Supreme Court of Justice. When the Supreme Court meets to consider a military case coming from one of the appeals courts, it also reforms itself, adding two military officers to the four civilian justices. The civilian appeals courts in Guatemala are empowered to approve, modify, or revoke decisions rendered by the first-instance military tribunal. The appeals court can also modify sentences, absolve the accused or find procedural errors in a case to be remanded to the first-instance court. An accused, his lawyer, any victim, or the prosecutor can appeal a case. Like the first-instance military tribunal, the civilian appeals court has subpoena power to call new witnesses or to seize new evidence. Evidence and testimony reaches the court via a variety of orders passed through civilian or military authorities located where evidence or witnesses are found. Furthermore, the appeals court can change a decision of innocence as well as guilt.

Some constitutions address an issue closely related to immunities, though not involving competence. Article 91 of the Colombian constitution states that in case of manifest violation of a constitutional precept to the detriment of an individual, the fact that a government agent was following orders does not exempt him from responsibility. Military personnel on active duty are exempt from this provision. In their case, responsibility shall fall solely on the superior who gave the order. The Guatemalan constitution, on the other hand, states that no public employee, civil or military, is obliged to obey manifestly illegal orders or those that imply the commission of a crime. 25 The Guatemalan wording still leaves room for argument

regarding the defense of superior orders, but the Guatemalan document is among those that recognize the practical effect of impunity that the defense of superior orders can have.

Guatemala has an established "fuero militar" that appears to lend prosecutorial immunity to military members, but details of the complete legal regime all but eliminate military juridical independence. This appears to be true in many Latin American systems, though the specifics vary considerably. Actual country-by-country practices diverge from system legalisms. Still, knowledge of the formal legal framework should inform juridical reforms intended to better divorce military power from the civilian political environment. In many countries, little can be changed in the legalistic sense to further incorporate the military into the civilian juridical regime.

We would suppose that one of the most important controls on extralegal military invasion of the civilian police function is the system of discipline internal to a military institution itself. Details of the military disciplinary system can have cumulative effect on the civil-military relationship. Not only are the efficiency and commitment to prosecuting offenders important, but so, too, is the defense of innocent accused. Invalid prosecutions of military personnel who resist illegal orders can logically have as pervasive an effect on institutional behavior as the simple protection of individual violators. Latin American military legal systems vary in the extent to which they balance the commander's disciplinary prerogatives with protection of the individual soldier against petty tyranny. Protective mechanisms find their theoretical bases in the desire to ensure troop morale by way of fairness and consistency in procedures and punishments. They also respond to demands of fairness from increasingly democratic societies. Any indirect salutary effect on the civil-military relationship may be secondary, but is important. In the countries addressed in this study, the tendency within the military institutions has been toward greater protection of the rights of an accused.
Semantics, culture, and internal organization.

How guerrillas are labeled or defined has a fundamental influence on the military-police relationship in many countries. Does the government label armed guerrillas as subversives, delinquents, terrorists, guerrillas, or something else? The terminology can impose restrictions, either legalistic and propagandistic, on actions that a government can take. An understanding of the differences in terminology from one country to another can provide an insight into the varying nature of the military-police legal regimes and into the practical problems of dividing responsibilities in law enforcement. Guatemala, for instance, signed and ratified the 1977 protocol to the Geneva Convention, which applies and amplifies the laws of war in nondeclared or internal conflicts. 26 The protocol, which is designed specifically to amplify the provisions of Common Article 3 of the 1949 Geneva Conventions in respect to non-international conflicts, is not formally or actively engaged in Guatemala, since the guerrilla force is very small in relation to the population (less than one tenth of one percent), and because the guerrilla occupies or controls no terrain. Given the irritant nature of the guerrilla forces and given their violent modus operandi, they are officially designated as "delinquent terrorists." They have not gained or been granted any status as combatants and remain in the status of criminals. Nevertheless, the Guatemalan Army concedes the application of Common Article 3, and claims to enforce humane conduct in recognition of the spirit of the 1977 protocols. Given the civilian legal status of the guerrillas in Guatemala, no guerrillas are

supposedly tried or executed by military courts. The legal requirement is to consign any captured guerrilla to the civilian courts with appropriate evidence of their commission of any of the various crimes contemplated by relevant articles of the civil penal code. Despite the legal status of the Guatemalan guerrilla, the government of Guatemala has been engaged in a political dialog with the guerrilla leadership.

In the official Argentine view, the term guerrilla (guerrillero) is applicable to open insurrection conducted in time of war. In order for those who participate in armed insurrection to qualify for the term guerrilla, it is indispensable that they meet the requirements of public international law. Otherwise they are maintained in the same status as insurrectionists that operate in peacetime, that is to say they are considered, as in Guatemala, common delinquents.

Government structures for public security and national defense in many Latin American countries include armed organizations that are often loosely described as paramilitary. The Argentine National Gendarmerie, answering to the Ministry of Defense, is a border guard organization that has limited internal police attributes and has also apparently at times been readied to accomplish international military missions. Costa Rica, a country that has maintained a positive international image in part by officially having no military, does have a multi-component public security ministry. Several organizations within the security system share police missions and attributes. They also share missions that have plainly military characteristics related to sovereignty protection.

Even in countries where the police and military organizations are bureaucratically distinct, there may be cultural links that carry weight in terms of the overlap between military and police functions. Civilian police officers may be required by regulation or custom to render a military hand salute or show some other deference toward military officers. It can be supposed that in crisis situations these customs could translate into de facto command relationships.

Individuals as well as organizations fall between what we can easily describe as police or military. In Guatemala, the army used to assign commanders on loan to units of the National Police. While in this capacity, these officers assumed police powers. They would ultimately return to the army, so they naturally retained personal and institutional loyalty and obedience, thereby giving the military chain of command great influence within the police structure. This practice, formerly prevalent throughout Latin America, is now disappearing. No such police assignments are given to Argentine military officers. In Colombia, though it has been decades since military officers have been assigned command of police units, officers have been assigned in recent years as municipal mayors or as civil judges. In either case, the position entails some control of civilian police assets. Both practices now seem to have been widely rejected as counterproductive.

Conclusion.

The act of a policeman rendering a hand salute to a military officer may not alone indicate a great deal about civil-military relations. If analyzed in concert with the other military-police overlaps noted above, observation of this act can help dissect misunderstandings that occur

when North American perceptions clash with Latin American realities. North American opinion of thepolice-military distinction relates to the broader North American understanding of politically appropriate societal roles for military institutions. An analytical look at the whole nature of military-law enforcement overlap shows what a complex task it would be to completely separate many Latin American militaries from law enforcement. Analysis of foreign aid allocations, security program funding, defense budgeting, unit structures, military doctrine, or training emphasis can all be served by a thorough inventory of the practical manifestations of the abstract terms--military, police, and civilian. When one includes consideration of the possibilities offered by foreseeable security environments in Latin America, the suggestion of completely divorcing the military from domestic law enforcement activities appears unworthy. The United States Posse Comitatus Act is a compelling point of departure for doubts regarding the relationship between democratic progress and use of the military to enforce the law. The Act reflects concern not just that the post-Civil War army could be used to break strikes, but that it could be used to enforce Black voting rights. Therein lies the dilemma. Military organizations may be inherently undemocratic (internally), but if the universe of academic concern about civil-military relations lies in the color of the uniform or the semantic characterization of an armed organization, sight may be lost of more important issues about how liberty is being served or abused by governmental force in general. Conformance to a theoretical separation of military and civilian functions in law enforcement could, depending on the country, require few changes. In many places, however, the socio-political advantage to be gained by strict distancing of the military from police attributes depends heavily on an improvement in the social image and professional performance of the police. 27 There remains a danger that should be considered carefully in each specific case: We may underwrite the professionalization of Latin American police forces (in obedience to an anti-military axiom) without dwelling sufficiently on the question, "Will improvement in national police capability necessarily diffuse and balance government power in the service of liberty, or will it just strengthen a different repressive tool of the central governmnent?"

ENDNOTES

1. "That standing armies are dangerous to the liberties of a people was proved in my last number--If it was necessary, the truth of the position might be confirmed by the history of almost every nation in the world. A cloud of the most illustrious patriots of every age and country, where freedom has been enjoyed, might be adduced as witnesses in support of this statement. But I presume it would be useless, to enter into a labored argument, to prove to the people of America, a position, which has so long and so generally been received by them as a kind of axiom." "'Brutus' IX" (from the New York Journal, January 17, 1778.) in Bernard Bailyn, The Debate on the Constitution, Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification, Part One (New York: Literary Classics of the United States, Inc., 1993), 41; James Madison, pamphleteering under the pseudonym "Publius," concurred with Brutus' anonymous opinion only two days later with an analysis of the historical tyrannies visited upon European countries by standing armies. Ibid, 47.BACK

2. United States Constitution, Article 1, Section 8.BACK

3. 22 United States Code 2420, Security Assistance Act.BACK

4. 18 United States Code 1385, Posse Comitatus Act.BACK

5. Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); D'Aquino v. United States, 192 F. 2d 338 (9th Cir. 1951).BACK

6. 10 United States Code 1331.BACK

7. 10 United States Code 371-380, Chapter 18--Military Cooperation With Civilian Law Enforcement Oficials.BACK

8. National Defense Authorization Acts, 1988-89, 1990-91, 1992-93 (Public Law 101-189, 101-510, and 102-190, respectively).BACK

9. 10 United States Code 375.BACK

10. See generally, "Intelligence Activities: Hearings before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities." 94th Congress 1st Session, 1975.BACK

11. Forrest McDonald, Novus Ordo Seclorum, (Lawrence: University Press of Kansas, 1985), 288.BACK

12. Ibid.BACK

13. "The 1991 Political Constitution of Colombia," El Tiempo in spanish (8 July 1991): 1-25 as translated in FBIS-LAT-91-170-S, 3 September 1991.BACK

14. Political Constitution of Colombia, Chapter 7, Title VII.BACK

15. Dr. Rafael Pardo was sworn in as the first civilian Minister of Defense on August 26, 1991.BACK

16. "Se desgrana la guerrilla?," Semana, (16 March 1993): 22.BACK

17. Political Constitution of Guatemala, Title V, Structure and Organization of the State, Chapter 5, Article 244 .BACK

18. Political Constitution of Peru of 1979, Article 273 found in Obando Arbulu, Enrique, editor, Fuerzas Armadas y Constitucion, (Lima: Centro de Estudios Internacionales, 1993), 119. By public referendum Peru adopted a new constitution on 31 October, 1993. The document retains a separate constitutional mention of the Armed Forces and the National Police, but does not establish or mention sub-units of the National Police.BACK

19. Political Constitution of Colombia, 1991. Chapter 6, States of Exception, Articles 212, 213, 214, 215.BACK

20. "Draft Law on Internal Disturbance in Congress," Bogota Inravision Television Cadena 1 in spanish 1730 GMT 25 March 1993.BACK

21. Political Constitution of Peru, 1979, Chapter VIII.BACK

22. Political Constitution of Colombia, Article 33.BACK

23. Latin American Weekly Report (6 May 1993): 203.BACK

24. "Bogota," El Espectador (21 October 1989): 6A.BACK

25. Political Constitution of Guatemala, Title 4, Chapter 1, Article 156.BACK

26. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).BACK

27. This is the conclusion that has been reached in Colombia. A global reform effort is being generated which, among other things, addresses the long term civil-military relationship. The future professional health of the military is linked to radical improvement in the civil police function. See "Luz verde a 'nueva' policia,"(Green light to the 'new' police) El Espectador (3 June 1993), 1.BACK