STRATEGY RESEARCH PROJECT

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THE POSSE COMITATUS ACT: IS THERE A NEED FOR CHANGE?

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The Posse Comitatus Act: Is There A Need For Change?

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ABSTRACT

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Americans have long feared a large standing army and military interference in civilian affairs. Military actions in the Reconstruction South, resulted in the Posse Comitatus Act of 1878, 18 U.S.C. § 1385. The Act, a criminal statute, prohibits the use of the military to enforce civilian laws. Exceptions are made for actions specifically authorized by the Constitution or acts of Congress.

Military participation in a number of incidents has raised questions as to whether the Act was violated or whether it should be changed to further limit military participation.

At the same time, the nation's drug problem resulted in a Presidential declaration of war on drugs. Several statutes were passed to allow the military to have greater involvement in drug interdiction. These statutes have resulted in greater cooperation between civilian law enforcement agencies and the military, but some people have called for even greater involvement by the military to stem further the flow of drugs into this country.

Neither the arguments for further curtailing military participation in law enforcement efforts nor the arguments for increased military participation in the fight against drugs the are persuasive.

Policy considerations and military necessity may call for a reduced military effort in drug interdiction, but this should not result in a change in the law.

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> 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 under this title or imprisoned not more than two years, or both.[1]

On May 20, 1997, a four-person Marine surveillance team was performing a counterdrug mission near Redford, Texas, in support of the United States Border Patrol.[2] At the same time, Esequiel Hernandez Jr., an 18-year-old high school sophomore, was tending to his family's goat herd in the same area.[3] The Marines had been patrolling the area for three days in a clandestine manner, their goal to remain undetected.[4] While there is some dispute as to whether Hernandez saw the Marines, the Marines allege that Hernandez fired two shots at them with a rifle he carried with him to protect his flock from predators.[5] To protect themselves and to determine what Hernandez was doing, the Marines kept Hernandez in sight by following him.[6] When Hernandez raised his rifle for a third time, Corporal Clemente Banuelos, the leader of the Marine unit, fearing that one of his troops was about to be shot, fired one shot at Hernandez, striking him in the right of his rib cage.[7] When the law enforcement officials summoned by the Marines arrived, Hernandez was dead, the first U.S. citizen killed by the military on U.S. soil as part of the war on drugs.[8]

Early in 1997, Senator Charles Grassley learned that an active-duty Army colonel was serving at the FBI as deputy chief of a counter-terrorism unit.[9] Senator Grassley sent letters to the Justice Department and the Department of Defense inquiring about the assignment.[10] He also had the officer, Colonel John Ellis, come to Capitol Hill to be interviewed by his staff.[11]

What do these seemingly unrelated incidents have in common? They both raised issues concerning an old, and usually rather obscure statute[12], the Posse Comitatus Act.[13]

The purpose of this paper is to examine the Posse Comitatus Act, its history and purpose, and the implications it has today for domestic military operations. At the same time, I will address whether the Act needs further changes in light of the military's roles and missions in our changing world.

GENESIS OF THE POSSE COMITATUS ACT

The American fears of a large standing army and interference in civilian affairs by the military started before the formation of the United States. Our complaints with the English monarchy, as stated in the Declaration of Independence included:

> He has kept among us, in times of peace, standing armies without the consent of our legislatures. He has affected to render the military independent of and superior to the civil power... For quartering large bodies of armed troops among us:[14]

Somewhat surprising, however, is the fact that the Constitution is silent concerning the enforcement of civil laws by the military.[15]

It wasn't until after the Civil War that numerous complaints were raised concerning the use of the military to enforce laws. A number of incidents in the South during Reconstruction brought matters to a head. Clearly, though, the straw that broke the camel's back was what was perceived as interference with elections by the Army.[16] In 1876, President Grant, a Republican, ordered troops into states in the South to watch over the balloting.[17] When Rutherford Hayes, a Republican, was elected based on the votes from three southern states where troops guarded the polls,[18] the Democrats in Congress, particularly the Southern Democrats, were so upset[19] they passed the Posse Comitatus Act.

THE ACT

The Posse Comitatus Act is a criminal statute, thus its codification in Title 18 of the U.S. Code. While it criminalizes the use of the Army and Air Force to enforce the civil laws, no one has ever been prosecuted for violation of the Act.[20] The exception to the prohibition, "except in cases and under circumstances expressly authorized by the Constitution or Act of

Congress,"[21] has subsequently allowed numerous uses of the military in enforcing the civil laws.

One question concerning the statute's applicability is to which branches of our armed forces it applies. On its face, the statute applies to the Army and the Air Force. The courts are split on the Act's application to the naval forces.[22] In spite of this divergence of opinion, by policy, the Act's prohibitions have been applied to the Navy and Marines, with exceptions on a case-by-case basis.[23]

Although a part of the Department of Transportation, the Coast Guard is "a military service and a branch of the armed forces of the United States at all times...."[24] Nevertheless, the Posse Comitatus Act does not apply to the Coast Guard.[25] In fact, the duties of the Coast Guard include the requirement to "enforce or assist in the enforcement of all applicable Federal laws...."[26] Finally, the Act applies to the National Guard only when it is federalized.[27]

Just what is prohibited by the Act in the way of support by the military to civilian law enforcement agencies? The simple answer is direct involvement in enforcing civilian laws.[28] To "execute" the law, there must be some authoritarian act.[29] A passive role in fulfilling law enforcement activities is not unlawful.[30] Section 375 of Title 10, United States Code,

provides that "direct participation...in a search, seizure, arrest, or other similar activity..." is prohibited.

Another aspect of the Act's scope that must be defined is where geographically the Act applies. Recently courts have had numerous opportunities to address the Act's extra-territorial application. Unfortunately, the courts have not resolved the issue. Early cases usually cited for the proposition that the Act has no extra-territorial application, *Chandler v. United States*[31], *Gillars v. United States*[32], and *D'Aquino v. United States*[33], were all cases involving military action in occupied territory after World War II.[34] Even though they all upheld the law enforcement actions of the U.S. military, they don't really answer the question of extra-territorial application outside an occupation setting.

Modern cases do not provide much help in this area. They have generally relied on *Chandler* or *Gillars*,[35] or they found some other reason for upholding the military's action.[36]

The Office of Legal Counsel, Department of Justice, has opined that the Act has no extraterritorial application.[37] Since it is up to the Department of Justice to prosecute the cases, this opinion will govern government actions until a court holds otherwise.

CHANGES IN THE ACT

The impetus to make the first substantive changes in the Act came as a result of America's war on drugs. Although President Nixon had taken measures to increase U.S. efforts against drugs,[38] it wasn't until the 1982 Department of Defense Authorization Act[39] that the military played much of a role in that war.

The pertinent provisions of the 1982 Authorization Act have been codified in Title 10, United States Code. Section 371 allows the military to share information concerning violations of the law with civilian law enforcement officials.[40] The statute provides that in planning military operations the military should consider the needs of civilian law enforcement officials.[41]

Section 372 allows the Department of Defense to make available to civilian law enforcement officials any equipment or facilities they may need to enforce civilian laws.[42] This section was amended in 1988 to make clear that this loan of equipment included associated supplies and spare parts.[43] Amended again in 1996, it now allows the loan of equipment and facilities for use in preparation for and response to a chemical or biological emergency.[44]

Section 373 allows DOD to train civilian law enforcement officials in the use of equipment, including the equipment provided under section 372.

Section 374 allows DOD personnel to maintain[45] and operate[46] equipment, including the equipment provided under section 372, in assistance to civilian law enforcement personnel. The statute limits the operation of equipment to the detection, monitoring and communication of air and sea traffic, as well as surface traffic outside the United States.[47] If the activity began outside the United States it can continue for up to 25 miles within our borders.[48] The statute also allows aerial reconnaissance[49] and the interception of vessels and aircraft outside the United States, but only for the purpose of communicating with the vessels or aircraft to direct them to a location designated by civilian officials.[50] The statute allows, in law enforcement operations outside the United States, the transportation of law enforcement personnel[51] and the operation of a base of operations for the civilians.[52] If interception of vessels has begun outside the United States and continues into the land area of the United States, section 374(b)(3) permits military personnel to continue operating the equipment.

Finally, section 375, as previously discussed,[53] makes it clear that these authorizations still do not allow military

personnel to directly participate in searches, seizures, arrests, or other similar activities.

These amendments have meant a new level of cooperation between the military services and civilian law enforcement agencies in the area of drug-law enforcement.[54] As early as 1984, DOD had honored almost 10,000 requests for assistance from civilian law enforcement agencies.[55]

The war on drugs is not the only civilian law enforcement effort where military participation has been deemed necessary. Terrorism has come to the forefront with such tragedies as the World Trade Center bombing and the bombing of the federal building in Oklahoma City.

In the National Defense Authorization Act for 1997, Congress, citing a potential threat to the national security of the United States from nuclear, radiological, chemical, or biological terrorism,[56] required the Secretary of Defense to create a program to provide civilian agencies with training and advice on reaction to a crisis involving weapons of mass destruction.[57] At the same time, however, the constraints placed on the military by the Posse Comitatus Act remained in place through section 375.

Title 10, section 382, United States Code, authorizes the Secretary of Defense to provide assistance relating to the

enforcement of the statutes involving biological or chemical weapons of mass destruction in an emergency situation.[58] The statute restrains the military from making arrests, directly participating in searches or seizures, or directly participating in the gathering of intelligence for law enforcement purposes,[59] except when needed for the immediate protection of human life, or if it is authorized under some other provision of law.[60]

RECENT ACTIVITIES

On February 27, 1973, an armed band, members of the American Indian Movement, seized the village of Wounded Knee, South Dakota.[61] As a result, the Federal Bureau of Investigation, the United States Marshall Service, and the Bureau of Indian Affairs police responded and established roadblocks at the major roads into and out of the village.[62]

On March 3, 1973, Colonel Volney Warner, Chief of Staff, 82nd Airborne Division, arrived at the reservation to advise the Department of Defense as to whether federal troops should be sent to assist in putting down the disturbance.[63] Colonel Warner also advised Department of Justice personnel on the adoption of the military's rules of engagement for civil disorders.[64] He was also instrumental in getting armored personnel carriers for use in the roadblocks.[65] Other military supplies and equipment were

provided,[66] and at least one reconnaissance flight was made by the Nebraska Air National Guard.[67]

After the uprising was quelled, a number of people were arrested for various crimes,[68] and civil law suits were filed.[69] One issue in most of these court actions was whether the military's role in stopping the uprising violated the Posse Comitatus Act.[70] None of the courts found that the military participation violated the Act.[71]

A trial in the news in the early 1990's had Posse Comitatus implications. The trial, a result of Operation Just Cause, was for Manuel Noriega. President Noriega was indicted by a federal grand jury in Miami on February 14, 1988.[72] The indictment charged him with participating in an international conspiracy to import cocaine into and out of the United States.[73]

On December 20, 1989, President Bush ordered U.S. troops into Panama for four stated purposes: to safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize General Noriega to face the drug charges in the United States.[74] General Noriega was ultimately captured by American military forces, but the Drug Enforcement Administration actually apprehended him after he was transported to Howard Air Force Base by the military.[75]

A number of motions were made in the course of the criminal trial, including one that the Posse Comitatus Act was violated.[76] The court never had to rule on the issue because the motion was withdrawn.[77]

United States v. Yunis,[78] describes three tests which have been applied by a number of courts to determine whether there has been a violation of the Act.[79] The first test is whether the civilian law enforcement personnel made "direct active use" of military personnel to enforce civilian laws.[80] There is no question of the "direct active" role of the military, but was it used by the civilian law enforcement agencies, or was it merely part of the military operation? The capture of the leader of an opposing military force is certainly a legitimate military goal, and in fact, one of the goals given by President Bush for the Operation was Noriega's capture.[81] At the same time, the capture was for the purpose of bringing him to criminal trial in the United States.[82] Thus, in additon to having a military purpose, Noriega's capture also had a civilian law enforcement purpose.

The second test is whether the use of the military "pervade[d] the activities" of the civilian law enforcement agencies.[83] In a large military operation where the DEA only played a minor role after Noriega's capture, it cannot be

honestly argued that the use of the military did not pervade the activities of the civilian law enforcement agencies.

The third test is whether the military personnel involved in the operation subjected citizens to the "regulatory, proscriptive, or compulsory in nature."[84] It is clear that the military's action in surrounding the Papal Embassy, where Noriega was seeking sanctuary,[85] was "regulatory, proscriptive, or compulsory in nature."

Applying any of the three tests, the military's action in the Noriega case seems to violate the Posse Comitatus Act. Why, then, was this argument abandoned? First, as discussed above, it is not clear that the Act has extraterritorial application. Second, the courts have not granted any relief to an accused even in the cases where they might have found a violation of the Act.

On February 28, 1993, members of the Branch Davidian cult opened fire on agents of the Bureau of Alcohol, Tobacco and Firearms (ATF).[86] The agents were attempting to serve arrest warrants.[87] This started a 51-day siege that ended on April 19, 1993.[88]

The initial confrontation on February 28 was conducted by approximately 100 agents from ATF, but they were supported by military Blackhawk helicopters.[89] The helicopters were provided by the Texas National Guard.[90] In testifying before Congress

during the review of government actions in the matter, Attorney General Janet Reno stated that she reviewed the plan of how to proceed with two military specialists.[91] The Army also provided training and equipment,[92] including Bradley armored vehicles from Ft. Hood.[93] After the ATF asserted that the Branch Davidians were operating a methamphetamine laboratory on the compound, a Defense Department counter-narcotics task force was called in to help plan the raid.[94] The Justice Department determined that it would not be permissible to have the military conduct the operation in a domestic law-enforcement situation.[95] For that reason, the Defense Department memo authorizing military participation in training the ATF personnel stated that "military personnel 'will not become involved in search, seizure, arrest, or similar law enforcement activities.'"[96]

In spite of these limitations, members of Congress charged that without the drug allegations the military would not have been allowed to provide the armored vehicles and helicopters.[97] These assertions were denied by Allen Holmes, Assistant Secretary of Defense for Special Operations/Low Intensity Conflict.[98] Also testifying before the joint subcommittee holding the hearings, then-Brigadier General Walter Huffman, at the time the Army's Assistant Judge General for Civil Law & Litigation, stated, "It's clear that the Posse Comitatus Act does not apply."[99]

A review of the type of assistance supplied by the military shows that General Huffman was correct in his analysis. The Texas National Guard supplied helicopters in its state status. As shown above, the Act does not prohibit use of the National Guard when it is not federalized.[100] Even if the helicopters belonged to the Regular Army, just as with the Bradleys and the other equipment provided, provision of equipment[101] and its operation[102] are not prohibited. Nor is training civilian law enforcement personnel or assisting in the planning of an operation.[103]

This brings us to the two incidents discussed in the opening of this paper, the shooting of Esequiel Hernandez and Senator Grassley's charge that the FBI's use of an Army colonel as its deputy chief of a counter-terrorism unit is a violation of the Posse Comitatus Act.

A review of the facts surrounding the shooting near the border shows the Posse Comitatus Act was not violated. As part of the increased effort against drugs coming into our country, Joint Task Force Six (JTF6) out of Fort Bliss, Texas, is responsible for assisting the U.S. Border Patrol in the counter-drug operations.[104] One of the methods used by JTF6 is to send out listening or observation posts along the border.[105] The mission of these posts is to observe while remaining

undetected.[106] If they spot any unusual activity they are to radio Border Patrol agents who would make any confrontations or arrests.[107] This sort of indirect assistance by the military is not the sort of law enforcement role prohibited by the Act.[108] The fact that the Marines were required to take a more active role in self-defense does not mean that the Act was violated.

As for the assignment of COL John Ellis to the FBI, the FBI kept COL Ellis away from law enforcement functions and did not allow him access to some of the most sensitive law enforcement information.[109] Although Senator Grassley remains unconvinced,[110] it is clear that no Posse Comitatus Act violation occurs simply by assigning a military officer to FBI headquarters in a non-law enforcement role.

Is There A Need For A Change?

The kinds of incidents discussed above have caused many people to call for a change in the Posse Comitatus Act. Some see the recent round of amendments as getting the military too involved with civilian law enforcement. Others think the military has not participated enough in certain types of law enforcement, like drug interdiction.

Those voicing the need for less military involvement in law enforcement usually raise four objections: it blurs the line between military and civilian roles, it undermines civilian

control of the military, it damages military readiness, and it is the wrong tool for this type of job.[111]

The argument seeking to support the position that military involvement causes a blurring of military versus civilian roles is that the civilian law enforcement role is usually a local one, performed by people trained for that mission and schooled on the importance of respecting individual rights.[112] On the other hand, the argument continues, the military is focused at the national level, soldiers are not trained for the law enforcement mission, and they are not as cognizant of individual rights.[113] This rationale is not persuasive. The role given the military in the war on drugs has generally been one where the focus must be national. Sometimes it is outside or along the U.S. borders, and it is always only augmentation of other law enforcement agencies.

As for the type of training involved, the military has been used in a manner to take advantage of its training. Whether it is tracking an airplane suspected of containing drugs, interdicting a boat at sea, or operating an observation post along the border, the missions are more akin to military missions than to traditional law enforcement efforts.

To argue that military personnel will not be cognizant of individual rights is by far the most spurious argument made. Every member of the U.S. military is well schooled in and has had

a true appreciation of an individual's rights drummed in them at every level.[114] Any military commander can give most American citizens, including many civilian law enforcement personnel, a lesson in what must be done in a criminal investigation to protect the rights of those involved.[115] Equally unpersuasive is the argument concerning the loss of civilian control over the military. For such a loss to occur, the type of involvement the military has had in the area of civilian law enforcement would have to "endanger[] liberties or the democratic process."[116] As dictated by 10 U.S.C. § 375, however, military members do not play a direct active role in those actions likely to have an impact on someone's liberties, and there is not even a rational argument for the proposition that the military's activities in this area endanger the democratic process.

The concern about the damage to military readiness brought about by a law enforcement mission is more difficult to dismiss. In fact, the military has objected to increased involvement in drug interdiction.[117] This involvement diverts personnel and resources in a down-sized military from traditional war-fighter missions and training. In some instances equipment has required modification to support this role, modifications that would not be required without this mission, and ones that may even detract from the normal use of this equipment.[118]

Another concern in this area is that people promoted and selected for leadership in these types of missions may not be the best ones to lead in combat.[119] A leader must still motivate his people and use the personnel and equipment at his or her disposal to accomplish the mission. The leader still has to make judgments in a timely manner based on the information available. Many times in law enforcement roles, leaders and their subordinates are faced with situations that test their courage and ability to function in a crisis. There is nothing incompatible with these leadership traits and those we expect of our combat leaders. The bottom line on readiness: There are some valid policy considerations that support a less active role in law enforcement activities by the military, but they do not rise to the level calling for a change in the law.

The final argument used to support a reduction of military involvement in the war on drugs is that it is the wrong tool for the job. Usually, the military has been used in temporary situations or ones of relatively short duration, but the war on drugs is a long-term effort with no end in sight.[120] The length of the mission is not an important factor in deciding whether it is a proper role for the military. However, it is also more expensive to use military personnel for this mission than it is to use civilian.[121] Matthew Hammond indicates that a soldier

costs the government $82,000 a year in training and upkeep, while the use of a civilian law enforcement person would be cheaper.[122] There may be some wisdom in this analysis, and, at least in some areas, an effort to use more civilians to patrol our southern border is under way.[123] In the absence of greater numbers of civilians to take on this important function, the military may be forced to keep the mission.

Those calling for greater military participation in law enforcement, particularly in the war on drugs, point to the Armed Forces as a vast pool of personnel and resources that could be used in this uphill battle.[124] They also argue that the military's function is to protect national security, and drugs are a threat to that security.[125]

The size of the military, by itself, certainly does not support a growing participation in drug interdiction. In 1989, DOD estimated that it would cost $18 billion annually to have an effective interdiction program.[126] With the myriad of missions for which the military is already being tasked, it is not feasible to invest more in the drug interdiction mission.

The importation and use of drugs in our nation is certainly a matter of national security. That does not mean that only a military effort should be used to address it. A limited involvement in the interest of national security may be

appropriate, but we cannot lose sight of the fact that our military's *raison d'etre* is to fight our nation's wars and to prevent them by our presence and readiness to fight if needed.

CONCLUSION

There are many good and valid reasons behind the Posse Comitatus Act. Our country's traditional reluctance to have military involvement in civilian law enforcement, based on the experience of the Founding Fathers under British rule, and furthered by military involvement in the post-Civil War Reconstruction in the South, is as sound today as it was in those days. Incidents such as the shooting of Esequiel Hernandez by the Marine patrol will generate calls for change. Such situations, however, are not the result of infirmities in the law. Statues permitting greater military involvement in certain aspects of law enforcement, brought about in large part because of the war on drugs, strike an appropriate balance between the civilian control of law enforcement with the assistance the military is best suited to provide.

A change in the Posse Comitatus Act is not supported by any of the arguments discussed. Whether to increase or decrease our military involvement in drug interdiction is a question of policy, not law, and for the reasons given, an increase is not appropriate. The current effort to reduce our participation in

certain aspects of interdiction, such as eliminating the patrols along the border,[127] is supported by military requirements, not concerns about encroachment in traditional civilian fields. A change in the application of the military, but not the law, is in the best interest of our military and our nation.

ENDNOTES

1. 18 U.S.C. § 1385 (1997)

2. S.C. Gwynne, *Border Skirmish*, TIME, August 25, 1997, at 40.

3. Jesse Katz, *A Good Shepherd's Death By The Military*, LOS ANGELES TIMES, June 26, 1997, at A9.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Benjamin Wittes, *A Posse Comitatus Crusade*, LEGAL TIMES, Sept. 1, 1997, at 8.

10. *Id.*

11. *Id.*

12. The Court of Appeals for the First Circuit has described the Act as an "obscure and all-but-forgotten statute." Christopher A. Donesa, *Protecting National Interests: The Legal Status Of Extraterritorial Law Enforcement By The Military*, 41 DUKE L.J. 867, 871 (1992), *citing* Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948), *cert. denied*, 336 U. S. 918 (1949).

13. 18 U.S.C. § 1385 (1997). *Posse comitatus* is defined as "the body of men summoned by a sheriff or other peace officer to assist him in making an arrest." BALLENTINE'S LAW DICTIONARY 964 (3d ed. 1969).

14. Declaration of Independence, *see* THE NEW YORK PUBLIC LIBRARY DESK REFERENCE 796 (Sarah Goldman. ed., 2nd ed. 1993). *See also* Peter M. Sanchez, *The "Drug War": The U.S. Military And National Security*, 34 A.F.L. REV. 109, 117 (1991).

15. Sanchez, *supra* note 14, at 118.

16. 5 CONG. REC. 2114 (1877)("to 'bull-doze' the voters of those States and carry the election for one of the political parties....").

17. John P. Coffey, *The Navy's Role In Interdicting Narcotics Traffic: War On Drugs Or Ambush On The Constitution?,* 75 GEO. L.J. 1947, 1953 n. 39 (1987); Leroy C. Bryant, *The Posse Comitatus Act, The Military, And Drug Interdiction: Just How Far Can We Go?,* ARMY LAWYER, Dec., 1990, at 3,5.

18. Coffey, *supra* note 17, at 1953 n. 39.

19. John J. Gibbons, *The Eleventh Amendment And State Sovereign Immunity: A Reinterpretation,* 83 COLUM. L. REV. 1889, 1979 (1983).

20. Roger B. Hohnsbeen, *Fourth Amendment And Posse Comitatus Act Restrictions On Military Involvement In Civil Law Enforcement,* 54 GEO. WASH. L. REV. 404, 408 (1986).

21. 18 U.S.C. § 1385 (1997).

22. *Compare* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (prohibition does not apply to the Navy), *and* Schowengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987), *cert. denied, sub nom.* Schowendgerdt v. United States, 503 U.S. 951 (1992) (same), *with* Walden, 490 F.2d at 372 (Act is applicable to all of armed services).

23. DOD Directive 5525.5, *Restrictions on Participation of DOD Personnel in Civilian Actions,* Encl. 4, para C. (Jan. 15, 1986).

24. 14 U.S.C. § 1 (1997).

25. United States v. Chaparro-Almeida, 679 F.2d 423, 425 (5th Cir.), *cert. denied,* 459 U.S. 1156 (1982); Donesa, *supra* note 12, at 871.

26. 14 U.S.C. § 2 (1997).

27. Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, And Posse Comitatus: The Meaning and Implications Of "In Federal Service",* ARMY LAWYER, June, 1994, at 35, 42.

28. United States v. Hartley, 796 F.2d 112 (5th Cir. 1986).

29. United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), *cert. denied,* 430 U.S. 970 (1977).

30. United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975).

31. 171 F.2d 921 (1st Cir. 1948), *cert. denied,* 336 U.S. 918 (1949).

32. 182 F.2d 962 (D.C. Cir. 1950).

33. 192 F.2d 338 (9th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952).

34. Bryant, *supra* note 17, at 8-9.

35. *See* United States v. Marcos, No. SSSS87 CR. 598 (JFK), 1990 WL 20160, at 8 (S.D.N.Y. Feb. 28, 1990).

36. *See* United States v. Gerena, 649 F. Supp. 1179 (D. Conn. 1986) (government use of military to transport defendant from Puerto Rico to New York not the type of direct involvement prohibited by the Act); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (use of Navy to transport highjacker to U.S not prohibited by the Act because the Act does not apply to Navy).

37. Bryant, *supra* note 17, at 4 and n. 14, *citing* Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice to General Brent Scowcroft, Assistant to the President for National Security Affairs, National Security Counsel (Nov. 3, 1989).

38. Darin A. Bifani, *The Tension Between Policy Objectives And Individual Rights: Rethinking Extradition And Extraterritorial Abduction Jurisprudence*, 41 BUFF. L. REV. 627, 635 (1993).

39. Pub. L. No. 97-86, title IX, § 905(a)(1), 95 Stat. 1115 (1981).

40. 10 U.S.C. § 371(a) (1998).

41. 10 U.S.C. § 371(b) (1998).

42. 10 U.S.C. § 372(a) (1998).

43. *Id.*

44. 10 U.S.C. § 372(b)(1) (1998).

45. 10 U.S.C. § 374(a) (1998).

46. 10 U.S.C. § 374(b)(1) (1998).

47. 10 U.S.C. § 374(b)(2)(A)and (B) (1998).

48. 10 U.S.C. § 374(b)(2)(B) (1998).

49. 10 U.S.C. § 374(b)(2)(C) (1998).

50. 10 U.S.C. § 374(b)(2)(D) (1998).

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55. Sanchez, *supra* note 14, at 122 and n. 141.

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61. United States v. Williams, 372 F. Supp. 65, 66 (D.S.D. 1974).

62. *Id.*

63. United States v. McArthur, 419 F. Supp. 186, n. 2 (D.N.D. 1976), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), 430 U.S. 970 (1977).

64. *Id.*

65. *Id.*

66. The court in *Jaramillo*, 380 F. Supp. at 1379, detailed a partial list of supplies and equipment, including: 1,100 Star parachute flares; 100,000 rounds, M-16 ammunition; 100 protective vests; 20 sniper rifles; and 15 unarmed armored personnel carriers.

67. *McArthur*, 419 F. Supp. at 192 n. 2.

68. *See Jaramillo,* 380 F. Supp. at 1375 (obstruction of law enforcement officers); *United States v. Banks*, 383 F. Supp. 368 (D.S.D. 1974) (burglary, larceny, assault on government agents, and other offenses); *United States v. Williams*, 372 F. Supp. 65 (D.S.D. 1974) (possession of marijuana).

69. *See Bissonette v. Haig,* 776 F.2d 1384 (8th Cir. 1985), *aff'd*, 485 U.S. 264 (1988) (action brought by residents of Pine Ridge Indian Reservation against military personnel and federal officers for damages for seizure and confinement).

70. *Jaramillo,* 380 F. Supp. at 1378-79; *Banks*, 383 F. Supp. at 377; *Bissonette,* 776 F.2d at 1385.

71. *Jaramillo,* 380 F. Supp. at 1381 (while finding the provision of equipment and supplies did not violate the Act, found nonetheless that the dependence of the civilian officials on the military was such that the government had not proven the lawfulness of their actions); *Banks,* 383 F. Supp. at 376-77 (same); *Bissonette,* 776 F.2d at 1390 (did not find a violation of the Act, but allowed the case to go forward to allow plaintiffs the opportunity to establish such a violation).

72. United States v. Noriega, 746 F. Supp. 1506, 1510 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

73. *Id.*

74. *Id.* at 1511.

75. *Id.*

76. *Id.* at 1511, n. 2.

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81. *See supra* at p. 10.

82. *Noriega,* 746 F. Supp. at 1511.

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84. *Id.*

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