

A STUDY OF THE MILITARY INTELLIGENCE SUPPORT TO DOMESTIC LAW
ENFORCEMENT IN COUNTERDRUG AND COUNTERTERRORISM OPERATIONS

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Homeland Security Studies

by

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ABSTRACT

A STUDY OF THE MILITARY INTELLIGENCE SUPPORT TO DOMESTIC LAW ENFORCEMENT IN COUNTERDRUG AND COUNTERTERRORISM OPERATIONS, by MAJ André A. Authier, 199 pages.

The purpose of the study will address the legal restrictions placed on Title-10 military intelligence support to civilian authorities within the United States conducting counterdrug and counterterrorism operations. The National Defense Strategy calls for the Department of Defense (DoD) to protect the homeland from terrorist attack and to provide support to the civilian interagency in response to natural or man-made disasters. Annual DoD congressional authorizations allow DoD to support drug interdiction efforts, while DoD Joint doctrine states that drug trafficking and terrorism are closely linked. The main issue is DoD's reluctance to fulfill this directive, due to the self-imposed limitations on military intelligence, so that it cannot provide much support to law enforcement within the United States. This creates a problem for DoD in how to make use of its intelligence capacity to fulfill the homeland defense directive when DoD restricts itself from providing intelligence support. The problem from the law enforcement and interagency perspectives is their lack of internal intelligence capacity to adequately protect the homeland. Military intelligence can solve the law enforcement intelligence shortfall issue. If DoD understands that it is legal for them to do so and updates its regulations accordingly, then DoD will benefit as well. Research for this topic conducted from August of 2008 thru June of 2011.

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ACRONYMS

AIM	American Indian Movement
AR	Army Regulation
ASA	Army Security Agency
C3I	Command, control, communications, and technical intelligence
CFR	Code of Federal Regulations
CIA	Central Intelligence Agency
CIP	Corps o Intelligence Personnel
CNT	Counter-narco-terrorism
DEA	Drug Enforcement Administration
DIA	Defense Intelligence Agency
DNI	Director of National Intelligence
DoD	Department of Defense
EO	Executive Order
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
GBR	Ground Based Radar
GSR	Ground Surveillance Radar
HEW	Health, Education, and Welfare
HIDTA	High Intensity Drug Trafficking Area
IES	Intelligence Evaluation Staff
ISR	Intelligence, surveillance, and reconnaissance
JAG	Judge Advocate General
JP	Joint Publication

JTF-N	Joint Task Force-North
LEA	Law enforcement agency
MID	Military Intelligence Division
MOS	Military Occupational Specialty
NGB	National Guard Bureau
NGR	National Guard Regulation
NORTHCOM	Northern Command
NSA	National Security Agency
ONDCP	Office of National Drug Control Policy
ORA	Organization Risk Analyzer
REMBASS	Remotely Monitored Battlefield Surveillance System
ROTHR	Relocatable Over the Horizon Radar
SAC	Special Agent in-Charge
SIPRNet	Secure Internet Protocol Router Network
SA	Special Agent
SSA	Supervisory Special Agent
UAV	Unmanned Aerial Vehicle
USC	United States Code

CHAPTER 1

INTRODUCTION

Introduction/Background

The purpose of the study is to address the legal restrictions placed on Title-10 military intelligence support to civilian authorities in the United States operating in a counter-narco-terrorism (CNT) capacity. The National Defense Strategy calls for the Department of Defense (DoD) to protect the homeland from attack and to provide support to the civilian interagency in response to natural or man-made disasters.¹ Annual DoD congressional authorizations allow DoD to support drug interdiction efforts.

The main issue is DoD's reluctance to fulfill this directive, due to the self imposed limitations on military intelligence support, so that it cannot provide much support to law enforcement within the United States. This creates a problem for DoD in how to make use of its intelligence capacity to fulfill the homeland defense directive when DoD restricts itself from providing intelligence support. The problem from the law enforcement perspective at the federal, state, and local level, as well as the interagency, is the lack of internal intelligence analysis capacity to adequately defend the homeland. Military intelligence can solve the law enforcement intelligence shortfall issue. If DoD understands that it is legal for them to do so and updates its regulations accordingly, then DoD will benefit as well.

The U.S. Northern Command (NORTHCOM) is the lead DoD entity responsible for coordination of Homeland Defense. Military intelligence support to the interagency within the United States prior to a terrorist incident or in support of the counterdrug operations mission will help prevent terrorist type incidents. The counterdrug operations

mission takes on a new dimension, in that the Department of State lists eighteen of forty-one terrorist organizations as receiving a sizable portion of their support from drug trafficking.² Several of these organizations operating within the United States raise funds for terrorist organizations that target U.S. persons and interests domestically and abroad, whether through narcotics trafficking or other fundraising mechanisms. The result is the War on Drugs and current War on Terror are now intertwined. The problem is the lack of understanding of the statutory and historical precedence of military support in the United States, and the case law that gave parameters for military intelligence support.

The ongoing terrorist threat and narcotics trafficking to the United States pose serious challenges to the interagency role of protecting the homeland. A key component to winning this fight is the same as winning fights in Iraq and Afghanistan—actionable intelligence. A shortcoming in this domestic fight is the lack of intelligence personnel to develop the picture and identify targets for the interagency (i.e. law enforcement) to investigate and prosecute. GEN Petraeus echoed this view in the fight on terrorism in an address to the Command and General Staff College Intermediate Level Education Class 09-001 on 22 September 2008. GEN Petraeus stated if he could only increase one capability, it would be the Intelligence, Surveillance and Reconnaissance (ISR) to focus kinetic action at the right targets.³ Military intelligence can fill this void based on legal precedence, but traditionally shied away from it for a variety of reasons. This thesis will examine the precedence of military intelligence support to law enforcement and mutual benefits the military and law enforcement stand to gain.

Military intelligence support to law enforcement and the interagency allows for the development of investigative links that may prevent terrorist attacks and reduce

narcotics trafficking. Military intelligence analysts can accomplish this as they search for administrative and background data from various governmental agencies, along with Internet and financial databases. The military analysts then can process this information to develop link analysis of persons involved in the drug and/or terrorist organization, the commodity flow of money, drugs, and weapons, communication links between individuals, and some pattern analysis for the groups' activities. These products would then be combined with police officer reports to build criminal cases or probable cause for law enforcement to obtain search warrants.

However, law enforcement's current focus is not building intelligence capability within their respective organizations, but rather patrol police officer capacity, as it is in the public's view. Law enforcement takes this approach to satisfy the population's perception of the problem (not enough street cops) verses a lack of actionable intelligence that allows the criminal organizations to survive despite law enforcement interdiction efforts. This practice aligns with the intent of the Violent Crime Control and Law Enforcement Act of 1994 according to Alfred Blumstein and Joel Wallman in their book "The Crime Drop in America."⁴ Law enforcement officials the author talked with stated this is a limitation in that police officers remain reactive to crime and criminal patterns, instead of fully identifying the networks to dismantle the criminal organizations. These officials admit that working the visible elements of crime does not equate to reducing crime, as law enforcement rarely identifies, arrests, and prosecutes the driving leaders behind the criminal activity.

Research Question

The primary research question is how can the military intelligence community support law enforcement in furtherance of domestic counterdrug and counterterrorism operations in a Title 10 capacity? Military intelligence can provide passive support domestically utilizing many areas of its capability to support law enforcement and the interagency in counterdrug and counterterrorism operations in a Title 10 capacity. However, the military intelligence community is constrained by regulation from fully supporting what is allowed by law.

The secondary research questions are:

1. What are the limits on military intelligence support to civilian law enforcement authorities working counterdrug and counterterrorism operations in a Title-10 United States Code (USC) role?
2. What does the military intelligence community have to offer to law enforcement in support of counterdrug and counterterrorism operations?
3. How does law enforcement visualize using military intelligence resources in counterdrug and counterterrorism operations?
4. What, if any, changes to law and/or DoD policy are needed to support law enforcement in counterdrug and counterterrorism operations?

Assumptions

The U.S. Army military intelligence community's perception is that it cannot assist in this role as it is barred by federal law, and subsequently DoD regulations. Most members of DoD do not understand the legal limits as stated in the laws themselves or ramifications of Title-10 USC military support to civilian law enforcement authorities.

Additionally, based on multiple unfunded requests from LEAs for investigative case support (i.e. intelligence analysis support) submitted to National Guard Bureau (NGB) – Operations (J3)—Counterdrug Division (CD) and to Joint Task Force—North (JTF-N) over the past several years, as well as interviews with law enforcement supervisors on the subject, the author assumes that law enforcement desires to have intelligence support to better focus its resources on narcotics and terrorist organizations, not just individuals.

JTF-N, under the mission to supply trained intelligence analysts to federal law enforcement in support of counterdrug missions, practices this with their intelligence oversight program. The author had personal experience with this while working an interagency assignment for a federal law enforcement agency that received a JTF-N (at the time called Joint Task Force-6) analyst on Title 10 orders. The intelligence oversight monitor, an Army military intelligence officer, stated that the analyst could not write up subpoenas for information (for law enforcement to approve), or conduct database searches on a U.S. person as it violated Posse Comitatus, even though a law enforcement agent directed the analyst to find the information. The monitor went so far as to state to the author, who is a National Guardsman, that the author could not write up subpoenas for information (for law enforcement to approve), or conduct database searches on a U.S. person by the same law. When the author showed the intelligence oversight monitor the regulations that authorized the National Guard to do so, the monitor understood he had more to learn about what the law and regulations state is permissible for military intelligence to do.

This subject has potential to be useful to civilian law enforcement, as stated by Dr. Steven Bucci, former Deputy Assistant Secretary of Defense for Homeland Security

and America's Security Affairs. Dr. Bucci references the Washington, D.C. beltway sniper incident in October, 2002, where military unmanned aerial vehicles assisted law enforcement in identifying and apprehending the shooters as a way the military intelligence community can assist law enforcement in counterdrug and counterterrorism operations.⁵

Definition of Terms

The author used the below terms to explain background events, agencies involved in intelligence work, and terms used in the thesis that the reader may or may not understand. The author provided these terms to clarify to the reader what the author meant when he used the terms in this thesis.

Church Hearings. Senate hearings concerning foreign intelligence service and the data collection on US persons using the federal government intelligence agencies.⁶

Counter-Narco-Terrorism (CNT). Actions taken against terrorism that is linked to illicit drug trafficking.⁷

Department of Defense (DoD). The Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the combatant commands, the Office of the Inspector General of the Department of Defense, the Department of Defense agencies, field activities, and all other organizational entities within the Department.⁸

High Intensity Drug Trafficking Area (HIDTA). Enhances and coordinates drug control efforts among local, State, and Federal law enforcement agencies. The program provides agencies with coordination, equipment, technology, and additional resources to

combat drug trafficking and its harmful consequences in critical regions of the United States.⁹

Intelligence Oversight. The process of ensuring that all DoD intelligence, counterintelligence, and intelligence related activities are conducted in accordance with applicable U.S. law, Presidential Executive Orders, and DoD directives and regulations.¹⁰

Law Enforcement Agency (LEA). Any of a number of agencies (outside the Department of Defense) chartered and empowered to enforce US laws in the following jurisdictions: The United States, a state (or political subdivision) of the United States, a territory or possession (or political subdivision) of the United States, or within the borders of a host nation.¹¹

National Defense Strategy (NDS). A document approved by the Secretary of Defense for applying the Armed Forces of the United States in coordination with Department of Defense agencies and other instruments of national power to achieve national security strategy objectives.¹²

National Guard Bureau (NGB). The agency that administers the Army National Guard and the Air National Guard; provides liaison between the Army and the Air Force and various states' National Guard units.¹³

National Intelligence. The terms “national intelligence” and “intelligence related to the national security” each refers to all intelligence, regardless of the source from which derived and including information gathered within or outside of the United States, which pertains, as determined consistent with any guidelines issued by the President, to the interests of more than one department or agency of the Government; and that involves (a) threats to the United States, its people, property, or interests; (b) the development,

proliferation, or use of weapons of mass destruction; or (c) any other matter bearing on United States national or homeland security.¹⁴

National Military Strategy (NMS). A document approved by the Chairman of the Joint Chiefs of Staff for distributing and applying military power to attain national security strategy and national defense strategy objectives.¹⁵

Office Of National Drug Control Policy (ONDCP). Agency that establishes policies, priorities, and objectives for the Nation's drug control program. The goals of the program are to reduce illicit drug use, manufacturing, and trafficking, drug-related crime and violence, and drug-related health consequences.¹⁶

Pike Hearings. Congressional House hearings concerning the intelligence activities, effectiveness and budget concerning the federal government intelligence agencies.¹⁷

Posse Comitatus. From Latin for "possible force," the power of the sheriff to call upon any able-bodied adult men (and presumably women) in the county to assist him in apprehending a criminal. The assembled group is called a posse for short.¹⁸

Terrorism. The calculated use of unlawful violence or threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious or ideological.¹⁹

Title 10 USC. Title 10 of the United States Code outlines the role of the armed forces in the United States Code. It provides the legal basis for the roles, missions and organization of each of the services as well as the US DoD. Each of the five subtitles deals with a separate aspect or component of the armed services. This deals primarily with those military forces under Presidential or Federal control.²⁰

Title 32 USC. Title 32 of the United States Code outlines the role of the United States National Guard in the United States Code. This deals primarily with those military forces under Governor or State control.²¹

U.S. Person. For intelligence purposes, a U.S. person is defined as one of the following: (1) a U.S. citizen; (2) an alien known by the intelligence agency concerned to be a permanent resident alien; (3) an unincorporated association substantially composed of U.S. citizens or permanent resident aliens; or (4) a corporation incorporated in the United States, except for those directed and controlled by a foreign government or governments.²²

Limitations

The research only covered the two law enforcement agencies responsible for counternarcotics and counterterrorism—the Drug Enforcement Administration (DEA) and the Federal Bureau of Investigation (FBI), respectively. The research focused on Presidential Commissions, Court rulings, Congressional hearings, and laws describing the intelligence functions of the military in relation to law enforcement.

Scope and Delimitations

This study limited its scope to intelligence support to law enforcement, as opposed to humanitarian support. It did not address the broader range of military support to civilian authorities. This thesis did not address Title 32 USC support, except as a comparison and contrast within the research. This thesis only referenced unclassified documents concerning the subject.

Significance of Study

The National Defense Strategy of 2008 calls for the Department of Defense (DoD) to defend the homeland from attack and to provide contingency support to civilian interagency in response to natural or man—made disasters.²³ The U.S. Northern Command (NORTHCOM) is the lead DoD entity responsible to coordinate this. This thesis sought to answer how the military intelligence community can contribute to this DoD mission. Specifically, how military intelligence can support law enforcement and the interagency in reducing narcotics trafficking, and preventing or reducing terrorist attacks and support. Identifying the parameters of intelligence support will help the military intelligence community and the U.S. based Commanders to know the full range of support they are allowed to provide to domestic law enforcement in the counternarcotics and counterterrorism fight and not break federal law.

Summary and Conclusions

Terrorism and narcotics trafficking in the United States will continue to pose serious challenges to the interagency role of protecting the homeland. The tie between narcotics trafficking and terrorism is documented by the State Department and the U.S. Drug Enforcement Administration.²⁴ As DoD has the responsibility to support the Department of Homeland Security, it is imperative to identify how the DoD can contribute in the intelligence arena. This area is more controversial than most areas of support, as the American public historically resisted the use federal troops inside the United States, other than for disaster relief. Reviewing the laws, regulations, and the history that created the controversy is essential to understand DoD's role in supporting the Department of Homeland Security in counternarcotics and counterterrorism.

¹Department of Defense, *National Defense Strategy* (Washington, DC: Government Printing Office, 2008), 7.

²DEA–El Paso Intelligence Center (EPIC), Brief given to Midwest High Intensity Drug Trafficking Area-Domestic Highway Enforcement Regional Coordination Committee, El Paso, Texas, 2 October 2008.

³General David H Petraeus, U.S. Army, Speech to the Command and General Staff College, Intermediate Level Education Class 09-01, Fort Leavenworth, Kansas, 22 September 2008.

⁴Alfred Blumstein and Joel Wallman, *The Crime Drop in America* (New York, NY: Cambridge University Press, 2006), 208.

⁵Dr. Steven Bucci, Deputy Assistant Secretary of Defense, Homeland Defense and America's Security Affairs, Speech to the Command and General Staff College, Intermediate Level Education class 09-01, Fort Leavenworth, Kansas, 31 October 2008.

⁶L. Britt Snyder, "Unlikely SHAMROCK–Recollections from the Church Committee's Investigation of NSA," *Studies in Intelligence* (Winter 1999-2000). http://cicentre.com/Documents/DOC_ChurchPike_Snyder.htm (accessed 22 September 2008).

⁷Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), GL-9.

⁸*Ibid.*, 156-157.

⁹*Ibid.*

¹⁰Inspector General of the Marine Corps, "Frequently Asked Questions," *Intelligence Oversight* 1, no. 1 (January 2008), http://hqinet001.hqmc.usmc.mil/ig/Div_Intell_Oversight/Newsletter/IO%20Newsletter-200801-Final.pdf (accessed 11 March 2009).

¹¹Department of Defense, Joint Publication (JP) 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), GL-9.

¹²Department of Defense, Joint Publication (JP) 1-02, *Department of Defense Dictionary of Military and Associated Terms* (Washington, DC: Government Printing Office, 2004), 368.

¹³Princeton University, "Wordnet," Princeton University Press, <http://wordnet.princeton.edu/perl/webwn?s=national%20guard%20bureau> (accessed 18 October 2008).

¹⁴Department of Defense, *DoD Directive 5143.01, Under Secretary of Defense for Intelligence* (Washington, DC: Government Printing Office, 2005), Enclosure 2.

¹⁵*Ibid.*, 370.

¹⁶The Whitehouse, Office of National Drug Control Policy, <http://www.whitehousedrugpolicy.gov/about/index.html> (accessed 18 October 2008).

¹⁷Gerald K. Haines, “The Pike Committee Investigations and the CIA,” *Studies in Intelligence* (Winter 1998-1999), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html (accessed 9 October 2008).

¹⁸Gerald Hill and Kathleen Hill, *People’s Law Dictionary*, Fine Communications, <http://dictionary.law.com/default2.asp?typed=posse+comitatus&type=1> (accessed 5 March 2009).

¹⁹*Ibid.*, 552-553.

²⁰NationMaster, Encyclopedia, *Title 10, U.S. Code*, <http://www.nationmaster.com/encyclopedia/Title-10-of-the-United-States-Code> (accessed 28 November 2008).

²¹NationMaster, Encyclopedia, *Title 32, U.S. Code*, <http://www.nationmaster.com/encyclopedia/Title-32-of-the-United-States-Code> (accessed 29 November 2008).

²²Executive Order no. 12,333, *Federal Register* 73 (4 August 2008), Part 3.5.

²³Department of Defense, *National Defense Strategy* (Washington, DC: Government Printing Office, 2008), 6-7.

²⁴Drug Enforcement Administration (DEA)–El Paso Intelligence Center (EPIC), briefing given to Midwest High Intensity Drug Trafficking Area- Domestic Highway Enforcement Regional Coordination Committee, 2 October 2008.

CHAPTER 2

LITERATURE REVIEW

Introduction

Military intelligence can provide passive support in a Title 10 status utilizing many areas of its capability to support law enforcement and the interagency in counterdrug and counterterrorism operations within the United States. To frame the parameters of this support, this study examined the restrictions placed on the military intelligence community in relation to its support of civilian law enforcement authorities. Specifically, the study investigated support for counter–narco–terrorism (CNT) as Title-10 personnel inside the United States. Chapter 2 discusses the body of literature already written on the topic. To do this the author reviewed major volumes on the subject, as well as journal articles and essays, laws, court rulings, and regulations. These documents will be discussed in this chapter.

Background Information

To understand the restrictions placed on Department of Defense (DoD) intelligence systems, one must first understand the events that led to the initial restrictions on U.S. intelligence activities before 11 September 2001. Five major volumes discuss the historical background and history of federal troop use domestically. These volumes tie to the thesis as they lay out the historical precedence on the topic of federal troop employment within the United States and cover the legal and constitutional questions that arose throughout the period. These volumes are *the Posse Comitatus Act and the United States Army: A Historical Perspective* by Matt Matthews, *the Role of Federal Military*

Forces in Domestic Disorders 1789–1878 by Robert W. Coakley, *the Role of Federal Military Forces in Domestic Disorders 1877–1945* by Clayton D. Laurie and Ronald H. Cole, and *the Role of Federal Military Forces in Domestic Disorders 1945–1992* by Paul J. Scheips, and *Military Intelligence* by John Patrick Finnegan.

Matt Matthews’ monograph, “The Posse Comitatus Act and the United States Army: A Historical Perspective,” traced the history of the Act, its revisions and how presidents implemented it in the United States.¹ Matthews asserted history showed the law is regularly misconstrued, and sought to clarify the nuances of the Act.² Matthews wrote the paper in mind of the pressures to change or clarify the law for domestic use in the post 9/11 era.³ While this work covered Posse Comitatus in depth, it did not cover the specific restrictions of military intelligence use domestically, which this thesis does.

The second volume, *the Role of Federal Military Forces in Domestic Disorders 1789–1878* by Robert W. Coakley, covered the federal troop use from after the Revolutionary War to the end of Reconstruction.⁴ The work sought to state plainly the reasoning behind the decisions to employ federal troops domestically.⁵ The work also looked extensively at the early use and justification for that use by framers of the Constitution who occupied political office during the times of federal troop employment. After covering several employments of federal troops in the early and mid 1800s, it laid out the circumstances and events that led to passage of the Knott Amendment, better known as the Posse Comitatus Act.⁶

The third volume, *the Role of Federal Military Forces in Domestic Disorders 1877–1945* by Clayton D. Laurie and Ronald H. Cole, covered military intervention for the period from the American industrial revolution after Reconstruction to World War

II.⁷ The authors cite several examples where Congress or the President granted exceptions to the Posse Comitatus Act, and the resulting societal reactions.⁸ This work examined how federal troops deployed to enforce the law in industrial, social and racial tensions.⁹ This work pertains to this thesis as it lays out exceptions to the Posse Comitatus Act, of which counternarcotics is one.

The fourth volume, *the Role of Federal Military Forces in Domestic Disorders 1945–1992* by Paul J. Scheips, covers post–World War II to the Los Angeles riots of 1992.¹⁰ This work looked at institutional changes affecting domestic use of federal troops, particularly the Army, after World War II and up to the Los Angeles race riots of 1992.¹¹ This work also examined more of the legal and case law generated by Army troops deployed domestically, and covered the National Guard in the context of the Army’s responsibilities to it.¹² This work is relevant to this thesis in that it provides coverage of the military intelligence use and implications during the period the volume covers.¹³

The fifth volume, *Military Intelligence* by John Patrick Finnegan, covered an organizational history of the Army’s intelligence activities.¹⁴ This volume discussed all intelligence activities worldwide and presents a wealth of information on the domestic activities of Army intelligence in the Twentieth Century. However, this volume did not address the legal context of intelligence support, mostly the historical uses. This volume complements the *Role of Federal Military Forces in Domestic Disorders* trilogy by expanding the coverage on the use of intelligence assets within the United States. This thesis will expand on the military intelligence aspects listed in Finnegan’s volume, looking at modern uses of military intelligence consistent with statute and case law.

Two theses covering the Whisky rebellion and the excise tax that precipitated it are relevant to this thesis, in that they laid the foundation for why the Executive branch considered using federal military forces in domestic disorders. Richard Kohn's "The Washington Administration's Decision to Crush the Whiskey Rebellion" laid out the debate within the federal government on the legality of using federal troops domestically, and the long term implications that the use of federal troops may cause politically.¹⁵ William Barber's "Among the Most Techy Articles of Civil Police: Federal Taxation and the Adoption of the Whiskey Excise" examined the whole debate during the Washington presidency regarding how to raise revenue for the federal government and the intertwining power struggle of taxation with the states.¹⁶ This work covered the historical context of the English tax system on the colonists, the strategic effects of a national tax and the potential for civil strife by enacting the tax.¹⁷

Post-Constitutional legislation affecting military use inside the United States started with the Judiciary Act of 1789 and the Militia Act of 1792, otherwise known as the Calling Forth Act, and also covered several revisions and legal opinions over the last 200 years. These Acts sought to address unfinished issues from the constitutional convention on enforcement of federal authority, which implied the use of the federalized militia by federal marshals. Mr. Mathews notes that from 1807 to 1878, the U.S. Government viewed using federal troops, both regular Army and the federalized militia, as permissible.¹⁸ As such, these laws form the initial legal foundation in which federal troops deployed in domestic missions.

Under Reconstruction, Congressional policy centered on assuring civil rights for newly freed Negroes by both law and Constitutional amendment. Congress accomplished

this by legislating for the Army to implement federal laws maintaining peace at polling places, ensuring Negroes the freedom to vote without intimidation.¹⁹ Southern White Democrats resented the 100,000 Negroes in the Army enforcing the occupation of the South under the authority of the Calling Forth Act.²⁰ They also resented Congressional Reconstruction legislation that overrode President Andrew Johnson's liberal Reconstruction policies, where the President's policies allowed white Southerners to conduct rampant racism against the newly freed Negroes.²¹ Once Congress proposed the 14th Amendment in June 1866, the Army then cracked down on Southern White discrimination by issuing General Order No.44, authorizing its forces to arrest local citizens for crimes when the local civilian authorities failed to do so.²² The using of laws to employ the Army in reconstructing the society in the South favorable to the former slaves created a backlash within Southern state congressional delegations, and led them to change the system when they attained the power in 1877.

Congress rewrote the law in 1878 to severely restrict its implementation by the President as a result of its use in the Civil War. This happened after the Army scaled back its involvement in reconstruction, resulting in increased intimidation on Negroes in the South. This enabled Southern White Democrats to win back control of the southern state Governments as well as the House of Representatives by 1874.²³ As a result of the presidential elections of 1876, and further Democrat gains in the 45th Congress, The Southern Democrats passed the Knott Amendment to the Army appropriations bill in 1878.²⁴ The Knott Amendment mandated that only the Constitution or Congress could authorize federal troop use domestically, verses a federal marshal or state governor.²⁵ This later became known as the Posse Comitatus Act.²⁶ This law is central to the thesis in

that those wishing to restrict or bar military intelligence support cite this law for their justification.

Congressional legislation throughout the 1900s brought the law back to close to the era from where the Act started. Congress, through granting exceptions to the Posse Comitatus Act, allowed the military to be used in numerous situations reminiscent of the 1860s and 1870s. Indeed, Title 10 USC Section 331–334 allows the President to use either other state militias or “armed forces as he considers necessary to quell civil disturbances, including insurrection and rebellion.”²⁷

In the 1960s, civil unrest resulting in demonstrations and riots broke out across the United States, due in part to civil rights demonstrations and marches in support of increased minority rights, as well as dissenters protesting the United States’ involvement in Vietnam. This led to several incidents where the President deployed the Army to help restore law and order in cities where riots occurred, when the riots overwhelmed the ability of local, state, and National Guard forces to subdue. When former Army captain Christopher Pyle disclosed the collection activities on U.S. citizens, the Senate held hearings on the collection in the Senate subcommittee on Constitutional Rights of the Senate Judiciary Committee in 1971.²⁸ Whole most of the collection involved keeping articles from journals and newspapers, some collection involved Army intelligence officers infiltrating dissident groups to gather leader identities, what they were saying, and how many supporters they had. Other files contained information on the finances, psychiatric records, and sex lives of individuals.²⁹ Although the information was extensive, the Senate Subcommittee for Constitutional Rights concluded that Army intelligence surveillance was not conducted with malevolent intent, but were applying

foreign intelligence collection doctrine domestically.³⁰ While Congress reacted strongly to this, the federal court system ruled the collection activities of publically available information to be legal.³¹ With the strong inquiries by Congress in these hearings, DoD placed restrictions on the military collection activities through DoD Directives 5200.26 and 5200.27, both of which are discussed later in this section. The end effect was that military intelligence professionals greatly diminished further collection activities on U.S. persons.

An expanding mission of the Central Intelligence Agency (CIA), combined with the protests to the Vietnam War led the CIA to collect information on U.S. citizens in much the same way as the Army did. However, CIA domestic activities did not get much attention until the Watergate scandal broke in the press. After this, the press covered the allegations of CIA collection on U.S. citizens as well as other CIA activities. This press coverage resulted in the Rockefeller Commission, set up by President Gerald Ford, to determine if CIA employees illegally collected on U.S. citizens and if so, to what extent. Concurrently with the Rockefeller Commission, Congress launched its own Committee hearings in both houses in 1975. This paper incorporates findings from the Rockefeller Commission Report. The results of these Committee hearings impacted military intelligence as an ancillary effect of reigning in the CIA. Therefore, this thesis will look at those actions of the CIA and the Congressional backlash in light of the secondary effects to military intelligence activities.

This paper incorporates four references concerning the Congressional hearings in 1975–1976. The first is “Unlikely SHAMROCK: Recollections from the Church Committee’s Investigation of NSA” by L. Britt Snider, and covered the Church Senate

hearings of the intelligence community on U.S. citizens who disagreed with the Vietnam War.³² As Mr. Snider was a primary Congressional staffer who worked the background information on the committee, he discussed the relationship of the Church Committee with the National Security Agency (NSA) and the administration, and the long terms implications of the report. The Church Committee looked extensively at the military intelligence community. The Committees reports, “Improper Surveillance of Private Citizens by the Military” and “National Security Agency Surveillance Affecting Americans” are the second and third references covering the subject. These reports influenced laws and executive orders governing military intelligence activities generated in the ensuing years.³³

The fourth reference reviewed is “The Pike Committee Investigations and the CIA” by Gerald Haines and covers the Pike House Committee hearings. The Pike Committee in the House of Representatives looked at the broader intelligence budget and organization apparatus. The view of the Pike Committee was that most intelligence collection activities in the U.S were illegal, and sought to publicly expose not only the activities, but their extent as much as possible.³⁴ This view created an adversarial relationship with the Executive Branch and intelligence communities and hampered the Pike Committee from getting most of the information it sought. This committee focused on the fact that over eighty percent of the U.S. Intelligence apparatus lies within the DoD, and questioned DoD (and former War Department) intelligence activities in the U.S.³⁵ These hearings are important to this thesis in that the hearings offer the House perspective, which was more antagonistic to the establishment on intelligence collection concerning anti-war demonstrators. Since Army intelligence, hence DoD, was heavily

involved in anti-war demonstrator collection, the hearings bear weight on the military intelligence support to domestic law enforcement.

Main Federal Laws Governing Intelligence

The Posse Comitatus Act of 1878 is based on the use of the Judiciary Act of 1789 and the Calling Forth Act of 1792. These two acts form the foundation on which the President can authorize military support for law enforcement authorities in the United States. Proponents of military support for domestic disorders cited these two acts repeatedly to justify the use of military forces to quell civil rebellion in the early history of the United States. The Posse Comitatus Act sought to reign in the frequent use of these two (and other) statutes to use the military to enforce civil law. An essay by John Brinkerhoff, “The Posse Comitatus Act and Homeland Security,” looked at the Posse Comitatus in the wake of September 11, 2001 events and examines the various interpretations of the Act.³⁶ A briefing by E. P. Visco regarding the Posse Comitatus Act and the experience of using the federal militia in domestic roles also looked at long term implications in the War on Terror.³⁷

Public Law 95–511, otherwise known as the Foreign Intelligence Surveillance Act of 1978 or FISA law, came out of the findings from the Congressional hearings of the time.³⁸ This law focused on foreign intelligence purposes instead of the domestic abuses that spawned the Congressional hearings. This law identified terrorism as a specific threat in addition to the foreign government spying, so sought to identify the targets of this Act as either a foreign power or agent of a foreign power. This Act went on to define the basic definitions of terms relating to intelligence collection, such as U.S. Person, international terrorism, sabotage, electronic surveillance, and other terms. It

described procedures for setting up a court to review legal process domestically where national security is concerned, and sought to protect the classified ways and means that information is derived from.

Public Law 108–458, otherwise known as the Intelligence Reform and Surveillance Act of 2004, affects intelligence activities as a whole. The act incorporated updates to the various laws governing intelligence collection on terrorist activities as a result of the terrorist attacks on September 11, 2001.³⁹ This act also covered changes to FBI collection priorities, transportation intelligence collection and security, joint terrorism task forces, money laundering and intelligence sharing among all federal agencies. The act specifically listed some military applications and support which bears on this thesis.

Code of Federal Regulations (CFR) 28, part 23 covered the criminal intelligence information systems to ensure they safeguard individual's Constitutional rights.⁴⁰ This also resulted from background events mentioned previously, and served as a limit on what civilian law enforcement can collect and retain. David Barton, Executive Director of the Midwest High Intensity Drug Trafficking Area, stated that if the military followed the same rules as law enforcement, namely 28 CFR, part 23, the military would not have any issues with intelligence oversight.⁴¹

In addition to the statutes, the author reviewed three court cases concerning intelligence collection on U.S. citizens. The U.S. Supreme Court case *Laird v. Tatum* dealt with Army spying on U.S. citizens.⁴² *United States of America v. Mary Sue Hubbard* dealt with how a group reacted to the government's spying on their legal activities.⁴³ *United States v. Red Feather* concerned what, if any, support the military

furnished to law enforcement was constitutional.⁴⁴ All of these cases generated case law in the use of military intelligence in domestic support roles.

Executive Orders on Intelligence Activities since 1976

Executive Order (E.O.) 11905, originally written in President Ford's administration, implemented recommendations made by the Commission on CIA Activities Within the United States, better known as the Rockefeller Commission. The Order established policies governing intelligence for national security, established oversight of the intelligence activities, delineated responsibilities of intelligence agencies, and sought to verify legal compliance.⁴⁵ This Order included military intelligence activities into the overall intelligence community and set the definition of a U.S. person.⁴⁶ Also, in defining responsibilities within DoD, the Order allowed for military intelligence to support to non-DoD agencies, set limitations on intelligence activities within the United States, and clarified intelligence support to law enforcement.⁴⁷ This order set the first Presidential level parameters after the exposure of Army intelligence activities within the United States in the 1960s and early 1970s and bears direct correlations to this thesis.

Executive Order 12333, originally drafted in President Reagan's administration, addressed the issues brought up by the Church Committee and Pike Committee hearings.⁴⁸ The version used in this thesis includes updates from E.O.13284, E.O. 13355 and E.O. 13470 from President Bush (43).⁴⁹ President Reagan intended for this document to bring oversight to the intelligence community and stop Congress from implementing more restrictive laws. E.O. 12333 expanded the definition of a U.S. person and framed government intelligence collection on them within the U.S. Person's constitutional rights.

The author noted that E.O. 12333 extended Constitutional protections to non-U.S. citizens and businesses that met specific requirements as well. This wide definition of a U.S. Person impacted DoD policy and regulations, which sought to define the limits of the military's ability to conduct intelligence activity in the United States. Intelligence oversight regulations and DoD Directives reference E.O. 12333 as the base document governing military intelligence activities within the United States. Therefore, this order is crucial to determine what is legal for military support to law enforcement counterdrug and counterterrorism support.

The executive orders referenced in the 2008 version of E.O. 12333 have varying impacts on the earlier version of E.O. 12333. While the author covered these executive orders here, these orders are not covered separately in Chapter 4 as the updated version of E.O. 12333 encompassed the content of these orders. Executive Order 13284 issued by President Bush (43) only pertained to E.O. 12333 in that it brought Homeland Security under the guidelines of E.O. 12333.⁵⁰ The new E.O. 12333 revoked E.O. 13355, issued by President Bush (43), due to changes in the format of E.O. 12333. Executive Order 13355 changes are still in the updated E.O. 12333, but in different locations than expressed E.O. 13355.⁵¹ Executive Order 13470, also issued by President Bush (43), made administrative and clarifying changes to E.O. 12333, which E.O. 12333 incorporated into the updated version published in the Federal Register in August 2008.⁵²

Department of Defense (DoD) Regulations and Doctrine Governing Military Intelligence Activities

The author researched four DoD Directives that cover intelligence activities concerning U.S. persons. These directives further refined intelligence laws and Executive

orders to implement policies and procedures governing intelligence collection and dissemination within the United States, which is central to the thesis of how military intelligence can support civilian law enforcement in counterdrug and counterterrorism. A brief description of these DoD Directives is listed below.

DoD Directive 5200.26 came as a result of the Army collecting intelligence on lawful U.S. citizen activities in the 1960s. This Directive covered the oversight of DoD investigative activities concerning DoD personnel (including DoD contractors), counterintelligence activities, and collection in support of civil disturbances within the United States and its territories.⁵³

DoD Directive 5200.27 discussed what the DoD should do when it gains information on persons and organizations not affiliated with the Department.⁵⁴ This Directive served as an overview only and addressed information concerning threats to DoD facilities and investigations of potential DoD hires. This Directive came as a result of the Army collecting information on U.S. citizens during the 1960s.

The third directive, DoD Directive 5240.1-R, discussed procedures covering the DoD intelligence activities affecting U.S. Persons.⁵⁵ This document laid out the limits of what DoD can do concerning collection on a U.S. person, was the DoD's implementation of Executive Order 12333, and served as the basis of all service manuals regarding the subject. This document listed fifteen procedures covering the scope, collection of intelligence, to include the various methods, storage, dissemination, and reporting of violations regarding intelligence activities affecting U.S. Persons.

The fourth directive is DoD Directive 5143.01, which addressed how the DoD intelligence components fit in with and under the new Director of National Intelligence

(DNI), created by the Intelligence Reform and Terrorism Prevention Act of 2004.⁵⁶ This document covered the basic command, working, and reporting relationships of the DoD intelligence components to the civilian intelligence structure headed by the DNI.

Memoranda covering intelligence activities and sharing

The author found three memoranda from the Executive Branch covering intelligence activities and functions. Two of these memoranda covered reciprocity of security clearances to allow members of the various federal government agencies to share intelligence information without having to conduct additional background checks on the requestors of the information first. These memoranda are significant in that they established the protocols for sharing classified, sensitive, and compartmental information with law enforcement agencies, as well as intelligence requirements those law enforcement agencies have. As military intelligence support to law enforcement must consider classification levels, these memos tie into this thesis as they address clearance issues inherent with interagency coordination. The third memorandum covered funding issues concerning narcotics and terrorism. This memo ties to the thesis in that it shows DoD is acknowledging the tie between narcotics and terrorism, which former Secretary of Defense Rumsfeld resisted.

The first memorandum is from the Director of Central Intelligence Directive 6/4 covered procedures for access to sensitive compartmental information, in layman's terms known as classified information. Annex F of this memorandum covered reciprocity of clearances among federal agencies to facilitate intelligence sharing of terrorist information.⁵⁷

The second memorandum is from the Office of Management and Budget and covered the reciprocity of clearances. This memorandum was in response to Public Law 108-458, which mandated the reciprocity of clearances among all federal agencies for access to the same level of classified information, based on need to know.⁵⁸

The third memorandum is from the Deputy Assistant Secretary of Defense for Counter-Narcotics. This memorandum covered using counternarcotics funds for counterterrorism support, recognizing that the two activities are often interrelated.⁵⁹ This memorandum addresses the requirement of the Defense Authorization Act for Fiscal Year 2006 to do so.

Military Intelligence Capabilities

The author reviewed several publications for military intelligence capabilities. These included several joint publications on intelligence and the interagency, Army intelligence field manuals for doctrine and capabilities, and National Guard regulations on counterdrug activity, the latter to see what is presently being done by the Guard. These references allowed the author to identify military intelligence capabilities that law enforcement could use, which this thesis addresses in Chapter 5. While the two main references on military intelligence capabilities highlighted below are “For Official Use Only,” the author used these references to collaborate unclassified references to keep this thesis at the unclassified level.

Handbook 2-50, Intelligence Systems, published by the U.S. Army Intelligence Center and Fort Huachuca is a “For Official Use Only Document” (FOUO) covering ground and aerial collection systems, as well as secure communications systems. This

book gives some of the capabilities the military intelligence community possesses that can be used in CNT.

The second document is also a FOUO document prepared by the 743rd Military Intelligence Battalion, titled *Warfighter's Guide*. This document covers the Intelligence, Surveillance and Reconnaissance systems, intelligence information systems, intelligence architecture and operations.

Interviews

The author interviewed supervisors from the Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), and the Office of National Drug Control Policy's High Intensity Drug Trafficking Area (HIDTA) Program. These agencies work counternarcotics and either support counterterrorism investigations (DEA and HIDTA) or have primary responsibility for them in the United States. (FBI). The interviews involved acquiring the law enforcement perspective on if law enforcement wanted military intelligence support, how they would utilize it, and how they viewed laws governing the military intelligence community's interaction with law enforcement.

Previous Essays

Previous essays on this subject of this thesis include a Federal Emergency Management Agency essay and four journal essays. To review, this thesis asserts that military intelligence can support domestic law enforcement in counterdrug and counterterrorism in a Title 10 status. The essay, "The Posse Comitatus Act and Homeland Security," is a history and analysis of the Posse Comitatus Act and explores the misconceptions of it. However, this essay did not address all of the legal issues

surrounding military intelligence support to law enforcement, so this thesis seeks to address this void.

An essay published in *Military Police* titled “Intelligence Support to Law Enforcement in Peacekeeping Operations,” discusses how military intelligence supported civilian law enforcement and military police in operations in Kosovo, Serbia.⁶⁰ This essay serves as a model for how military intelligence can support law enforcement, and addresses the military intelligence capabilities that law enforcement used in Kosovo effectively. This thesis therefore seeks to complement and expand its application on the domestic front.

An essay published in the *Military Intelligence Professional Bulletin* titled “Bridging the Intelligence Gap in the Heartland: Evolving MI Roles in Support to Domestic Criminal Threats,” covered military intelligence roles in the United States. The essay parallels this thesis, but again, the essay did not fully address the legal issues of intelligence support, nor did it establish a law enforcement need.

Another essay is a commentary published by the Criminal Justice Ethics titled “Guiding Lights: Intelligence Oversight and Control for the Challenge of Terrorism.” This essay looked more at guidelines for the civilian intelligence agencies in the counterterrorism role to protect the United States. The commentary is similar to 28 CFR, Part 23 governing the criminal justice intelligence systems, and bear weight on how military intelligence can meet the legal restrictions placed on it in support of domestic law enforcement. This thesis will incorporate the essay as a comparison with 28 CFR, Part 23.

Summary and Conclusion

The above mentioned documents have direct bearing on this thesis as they form the basis of governing intelligence activities for military intelligence and the intelligence community as a whole. However, few of these policies and regulations address a support role to law enforcement vice independent collection and analysis of U.S. person data, especially if held by law enforcement or collection of data is directed by law enforcement. This study will help to clarify those restrictions in the light of the Wars on Drugs and Terror, of which the military is a part.

Chapter 2 addressed the background information on three of the four secondary questions listed in Chapter 1. The fourth question, “What, if any, changes to law and/or DoD policy are needed support law enforcement in domestic counterdrug and counterterrorism operations?” will be addressed in Chapter 6, as it will draw on conclusions of the research reviewed in Chapters 4 and 5. While Chapter 2 contained a cursory overview of the major works concerning the thesis of how the military intelligence can support law enforcement in Counterdrug and counterterrorism, Chapters 4 and 5 will examine the research in much greater detail. In Chapter 3, the author will cover his research methodology in acquiring the listed materials for this paper.

¹Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 5-34. The topics covered in Chapter One include and overview of the Army as a Posse Comitatus from 1787 to 1865, what the Constitution states about using the Army for law enforcement, overview of the Judiciary and Calling Forth Acts, the Whiskey rebellion, the Fugitive Slave Act and how the presidents from Adams to Tyler used the Army in a Posse Comitatus role. Chapter Two topics include how the Army as law enforcement was used during Reconstruction following the Civil War and the origins of the modern Posse Comitatus Act of 1878, dealing with both Presidential and Congressional views on using the Army prior to the 1878 passage.

²Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 1.

³*Ibid.*, 1-2.

⁴Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), vii.

⁵*Ibid.*

⁶*Ibid.*, 344.

⁷Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1988), v.

⁸*Ibid.*, 3.

⁹*Ibid.*

¹⁰Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 1988), v.

¹¹*Ibid.*, vii.

¹²*Ibid.*

¹³*Ibid.*

¹⁴John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), xi.

¹⁵Richard H. Kohn, “The Washington Administration’s Decision to Crush the Whiskey Rebellion” *Journal of American History* 59, no. 3 (December 1972), 570-571, <http://www.jstor.org/stable/1900658> (accessed 2 April 2009).

¹⁶William D. Barber, “‘Among the Most Techy Articles of Civil Police’: Federal Taxation and the Adoption of the Whiskey Excise” *The William and Mary Quarterly*, 25, no. 1 (January 1968), 58-84, <http://www.jstor.org/stable/1900806> (accessed 3 April 2009).

¹⁷*Ibid.*, 60-62.

¹⁸Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 5.

¹⁹*Ibid.*, 32.

²⁰Ibid., 23.

²¹Ibid., 24.

²²Ibid., 25n12; This is referenced by Matt Matthews from James E. Sefton's work, *The United States Army and Reconstruction, 1865-1877* (Baton Rouge: Louisiana State University Press, 1967), 73.

²³Ibid., 30.

²⁴Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 343-344.

²⁵Ibid.

²⁶Matt Matthews, "The Posse Comitatus Act and the United States Army: A Historical Perspective" (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 33.

²⁷U.S. Congress, *Insurrection Act*, Title 10 United States Code, § 331 and 335, <http://www.freerepublic.com/focus/f-news/1477646/posts> (accessed 3 December 2008); § 331: Federal aid for State governments—Whenever there is an insurrections in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection; § 332. Use of militia and armed forces to enforce Federal authority—Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

²⁸Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 1988), 390.

²⁹Ibid., 395.

³⁰Ibid.

³¹United States v. Red Feather, 392 F. Supp. 916 (D.C.S.D. 1975).

³²L. Britt Snyder, "Unlikely SHAMROCK—Recollections from the Church Committee's Investigation of NSA," *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, (1976), http://cicentre.com/Documents/DOC_ChurchPike_Snider.htm (accessed 22 September 2008).

³³Senate, *Book III: Improper Surveillance of Private Citizens by the Military*, 94th Cong. 2nd Sess. (1976), <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIk.htm> (accessed 2 February 2009); Senate, *Book III: National Security Agency Surveillance Affecting Americans*, 94th Cong., 2nd Sess. (1976). <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIj.htm> (accessed 2 February 2009)

³⁴Gerald K. Haines, “The Pike Committee Investigations and the CIA,” *Studies in Intelligence* (Winter 1998-1999), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html (accessed 9 October 2008); The basis of the statement is in several paragraphs, where Pike “believed the agency to be a rogue elephant “out of control.” Also, “Pike insisted that the committee had the authority to declassify intelligence documents unilaterally.” This is the aberration where general intelligence procedures state that: either the originator of the document, a review committee of intelligence professionals, or the date has passed on the “Declassify line” are the ones who can declassify documents.

³⁵*Ibid.*, under the section “Investigation of the Intelligence Budget,” first paragraph and third paragraph from the end.

³⁶John R. Brinkerhoff, “The Posse Comitatus Act and Homeland Security,” *Homeland Security Journal* (February 2002), <http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm> (accessed 23 September 2008).

³⁷Eugene P. Visco, “More Than You Ever Want to Know About Posse Comitatus” (MORS Workshop, Homeland Security–Homeland Defense, Baltimore, MD, November 2005), <http://www.mors.org/meetings/hls/presentations/visco.pdf> (accessed 3 January 2009).

³⁸*Foreign Intelligence and Surveillance Act of 1978*, Public Law 95-511, 95th Congress (25 October 1978); The Church and Pike Committee reports published in 1976 laid out the extent of the federal government’s collection. This included both foreign and domestic aspects. Public outrage at the extent of the domestic collection program, to include collection of anti-war demonstrators and civil rights demonstrators, led to the implementing of the FISA law and a court to oversee it as a way to curb the Executive Branch’s power in collecting on U.S. citizens.

³⁹*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), 1.

⁴⁰Criminal Intelligence Systems Operating Policies, 28 CFR, Part 23, Volume 63, no. 250, 71752-71753 (30 December 1998), 2, http://www.it.ojp.gov/documents/28CFR_Part_23.PDF (accessed 3 December 2008).

⁴¹David Barton, interview by author, Kansas City, MO, 25 November 2008.

- ⁴²Laird v. Tatum, 408 U.S. 1 (1972).
- ⁴³United States v. Mary Sue Hubbard, et al. Criminal No. 78-401 (District of Columbia, 1979).
- ⁴⁴United States v. Red Feather, 392 F. Supp. 916 (D.C.S.D. 1975)
- ⁴⁵Executive Order 11,905, Federal Register, § 1. <http://www.ford.utexas.edu/LIBRARY/speeches/760110e.htm> (accessed 17 February 2009).
- ⁴⁶Ibid., § 2.
- ⁴⁷Ibid., § 4.
- ⁴⁸Executive Order 12333, Federal Register, (1981), Part 2, § 2.1 and 2.2. <http://www.archives.gov/federal-register/codification/executive-order/12333.html> (accessed 22 September 2008).
- ⁴⁹Executive Order no. 12,333, Federal Register No. 73, (4 August 2008), 1.
- ⁵⁰Executive Order no. 13,284, Federal Register No. 68, (28 January 2003), 4075.
- ⁵¹Executive Order no. 13,355, Federal Register No. 69 (1 September 2004), 53593.
- ⁵²Executive Order no. 13,470, Federal Register No. 73 (4 August 2008), 45325.
- ⁵³Department of Defense, *Defense Investigative Program*, Directive 5200.26, 1971 (Washington, DC: Government Printing Office, 1979), 2-3.
- ⁵⁴Department of Defense, *DoD Directive 5200.27: Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense* (Washington, DC: Government Printing Office, 1980), 1.
- ⁵⁵Department of Defense, *DoD Regulation 5240.1-R: Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 2.
- ⁵⁶Department of Defense, Directive 5143.01: *Under Secretary of Defense for Intelligence (USD(I))* (Washington, DC: Government Printing Office, 2005), Reference and §1 - Purpose.
- ⁵⁷Director of Central Intelligence. *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information*, Directive No. 6/4 (Washington, DC: July 1998), 1.

⁵⁸Office of Management and Budget. “Reciprocal Recognition of Existing Personnel Security Clearances” (Memorandum, Washington, DC, December 2005), 1.

⁵⁹Deputy Secretary of Defense – Counter-Narcotics. “Use of Counternarcotics Funds for Counterterrorism” (Memorandum, Washington, DC, April 2006), 1-2.

⁶⁰Jeffrey Jenning and Jennifer Gaddis. “Intelligence Support to Law Enforcement in Peacekeeping Operations,” *Military Police* 19.2 (September 2002), 16. Remote access for CFSC and AKO, <http://find.galegroup.com/itx/start.do?prodId=SPJ.SP00> (accessed 17 November 2008).

CHAPTER 3

RESEARCH METHODOLOGY

Introduction

Understanding all the ways the military intelligence community in a Title 10 status can support law enforcement in the furtherance of counterdrug and counterterrorism operations will help the Department of Defense (DoD) determine how to best support the interagency in preventing or reducing terrorist attacks and support. Military intelligence can provide passive support utilizing many areas of its capability to support law enforcement and the interagency in counterdrug and counterterrorism operations within the United States. Therefore, this research purposed to identify the legal parameters of military intelligence support in a Title 10 status to domestic law enforcement in order to assist the military intelligence community and the commanders based within the United States in understanding the full range of support they are allowed to provide law enforcement in support of counterdrug and counterterrorism operations and not break federal law.

Research Methodology

The author researched what others previously wrote concerning military intelligence support to domestic law enforcement. The author found several writings about the practices in the 1960s and early 1970s, but none of those works explored the legal justification in depth for the decision to employ military intelligence assets in the manner the Johnson and Nixon administrations used them. Therefore, the author developed an outline on how to conduct the research that encompassed three areas—

historical and legal background, military intelligence capabilities, and domestic law enforcement intelligence support requirements. These historical background events cover the period from the Constitutional debates to the 11 September 2001 terrorist attacks in New York City, New York, and Washington, District of Columbia. Concurrently with the events are the legislation that affected domestic federal troop use initially, and then military intelligence support. Federal case law concerning the Army's activities domestically in the 1960s and 1970s, where military intelligence conducted domestic support to law enforcement outside of any defined bounds, proved crucial to defining the legal parameters by a court test. Most of the information already existed in the form of federal law, case law, regulations, Congressional hearings and various texts on these. Once the legal aspect was satisfied, then research focused on the military intelligence capabilities that could legally be used inside the United States, and the law enforcement intelligence support requirements.

Initial research covered the background events that shaped the present climate on military intelligence activities in the United States. The author examined the Constitutional issues surrounding early domestic federal troop use, circumstances leading up to the passage of the Posse Comitatus Act, Army intelligence history from 1945, the Rockefeller Commission Report, the Church hearings, and the Pike hearings. The aforementioned topics are important as they form the basis of the Foreign Intelligence and Surveillance Act (FISA) and Executive Order 12333. These hearings dealt with the Army Intelligence Command, the Central Intelligence Agency and the Federal Bureau of Investigation (FBI) domestic intelligence collection programs. They also covered the FBI's use for political purposes, as the wider impact fell on all elements of the

intelligence community, the bulk of which resides within the Department of Defense (DoD).

Laws and orders governing the military in a law enforcement role interwove with the historical events. The historical review covered the period in the 1880s when military intelligence officially came into being, and the focus shifted to the intelligence support aspect of that overall military support. Principle laws regarding this include the Posse Comitatus Act, the FISA of 1978, the National Defense Authorization Act of 1989, the Intelligence Reform and Terrorism Surveillance Act of 2004, and the U.S. A. PATRIOT Act.

Next came a review and analysis of the regulations and laws to see what limits are imposed on the military intelligence apparatus to provide intelligence support in a Title 10 status to law enforcement. Some of the documents regarding this are Executive Order 12333, and DoD Regulation 5240.1-R, DoD Directive 5143.01, Army Regulation 381-10 “U.S. Army Intelligence Activities”, and other applicable DoD Directives and regulations identified during research. Most DoD directives have not been updated in over twenty four years. So the author examined the impact on the present military intelligence support environment domestically.

The fourth step identified the military intelligence capabilities under Title 10 authority that would first be of use in a domestic counter–narco–terrorism (CNT) effort, counterdrug operations, and counterterrorism operations. This involved looking at the intelligence assets, training and capabilities of military intelligence professionals. This also entailed ensuring that the capabilities discussed to support law enforcement are feasible, acceptable, and suitable based on the laws reviewed. This also bled over into the

next area of research, as law enforcement verified the suitability of resources to their mission.

The fifth step determined the need of law enforcement requiring military intelligence support to counterdrug, CNT, and counterterrorism operations investigations, determining when and where to apply military intelligence capabilities, and to focus intelligence preparation of the environment on the strengths and weaknesses of the traffickers and terrorists. The author conducted interviews with supervisors from the FBI Intelligence Division, a Drug Enforcement Administration (DEA) Special Agent In-Charge (SAC), and a Director of the Office of National Drug Control Policy's High Intensity Drug Trafficking Area (HIDTA) program. The author chose the FBI as it has statutory responsibility to investigate terrorism and terrorist plots within the United States. The Kansas City, Missouri office possesses a Joint Terrorism Task Force and two FBI intelligence groups within easy access to the author to discuss their role in counterdrug, CNT, and counterterrorism operations, and the FBI's needs for additional support as identified by the 9/11 Commission Final Report. The author chose DEA as it has the responsibility to enforce Title 21 of the United States Code concerning narcotics and narcotics trafficking laws. The DEA SAC spoke at the Command and General Staff College at Fort Leavenworth, Kansas, and agreed to a follow-up discussion regarding military intelligence support to law enforcement. The SAC possessed extensive experience in dealing with international drug trafficking organizations, and numerous regional drug trafficking organizations with international ties. The author selected the Director of the Midwest HIDTA in Kansas City, Missouri, as the Director chaired the HIDTA intelligence committee for several years that dealt with intelligence policy issues

relating to law enforcement, and possessed keen insight on the use of military to support law enforcement in counterdrug, CNT, and counterterrorism operations. These interviews proceeded with discussion on how the agency used military intelligence support, what they liked about it, and what they saw as issues. The author did not use a formal survey to allow the law enforcement leaders freedom to cover what they thought important to the thesis, and all contributors agreed to attribution for their thoughts.

The final step entailed determining what changes to law or policy are needed to better facilitate the military to conduct intelligence support for law enforcement for counterdrug and counterterrorism operations. Along with this, the author listed recommendations on how military intelligence should be used in support of the inter-agency for domestic counterdrug and counterterrorism operations in a Title 10 status.

Discussion of Methodology Feasibility, Suitability, Relevance and Source Credibility

The research methodology laid out here presented a systematic study of the topic and provided a system of methods to develop the analysis of the information. The author reviewed research papers and other theses published by the Combined Arms Center at Fort Leavenworth, Kansas to see how others approached this type of project. The method outlined here is consistent with most of those works. The events used for the background are cited by both supporters and critics of the research topic as to why it should or should not be allowed. The author validated the source credibility by using the actual public laws, as well as examining books and articles and comparing them with the Senate reports and regulations covering the same topics in the written works. Agency personnel

interviewed all possessed valid agency credentials from their agencies, and have reputations within the national law enforcement community.

Summary and Conclusion

The results of this methodology of research and analysis should represent a complete and unbiased look at the restrictions and capabilities of military intelligence in a Title 10 status to provide intelligence support to law enforcement, as well as what law enforcement desires is assistance from military intelligence. The analysis in Chapters 4 and 5 of the information discussed in Chapter 2 using the methodology cited here will support the thesis of this work. The results will assist the senior military leadership in both the active and reserve components to plan for the best support to the civilian interagency as law and doctrine dictate.

CHAPTER 4

ANALYSIS OF LAW, EXECUTIVE ORDERS, AND REGULATIONS

Military intelligence in a Title 10 status can provide passive support domestically utilizing many areas of its capability support to law enforcement and the interagency in counter-narcotics and counter-terrorism operations. The purpose of this chapter is to explore what the legal justification of this support is. To explore the legal justification, this thesis covered major background events and the laws relating to the subject. The results of this research will help to shape how military intelligence can support the interagency, as mandated in the 2008 National Defense Strategy and identify potential friction points or areas needing clarification.

Chapter 4 is organized into five sections:

Section I—Introduction

Section II—Background Events and Historical Precedence

Whiskey Rebellion

Tax Rebellion of 1799

Fugitive Slave Act through Reconstruction

Posse Comitatus Act

Section III—Intelligence

Military Intelligence Development

Military Intelligence Domestic Collection in the 1950s and 1960s

Congressional Hearings and the Foreign Intelligence Surveillance Act

Section IV—Modern Era

War on Drugs

9/11 and the 9/11 Commission Report

Executive Orders and DoD Directives

Regulations and Doctrine

Section V—Conclusion

Introduction

The roots of the use of federal troops in domestic situations date back to the late 1700s after the United States gained independence, when the Continental Congress raised the question regarding the foundations that buttressed government authority.¹ The framers of the U.S. Constitution did not proscribe using federalized militia or Army as a posse comitatus.² Alexander Hamilton wrote about the need to call the military to aid the civil magistrate in emergencies.³ The military was to serve as a backstop where the civilian component was not able or willing to handle the situation, using common sense and balance when doing so, and meant to encourage the populace to submit to the civil authorities.⁴ The debate indicates that the Continental Congress understood that using the military in domestic situations under certain circumstances was prudent and to be in support of the civilian law enforcement, not independent of it.

Congress somewhat codified the ability to use troops as a posse comitatus in two important laws: The Judiciary Act of 1789 and the Calling Forth Act of 1792. However, Congress used vague language in each of these statutes. The Judiciary Act inferred the president's use of the military under section 27 "he shall have power to command all necessary assistance in the execution of his duty."⁵ The Military Act of 1792, also known as the Calling Forth Act, specified that the military could be used to suppress insurrection and enforce the laws of the United States when the opposition is too strong for regular

judicial proceedings to handle.⁶ The act also placed the militia on par with federal Army troops, subjected the militia to federal regulations when used to quell insurrections, stated that marshals shall have the same powers as sheriffs in executing the laws of the nation, and “provided the federal marshal the power to use the military as a posse comitatus.”⁷ These acts set the legal framework to use military forces to subdue domestic disorders, and underwent an important test in the course of the Whiskey rebellion.

Now that the legislative foundation for use of military force is laid, the defining events that validated the legislation and circumstances leading to the Posse Comitatus Act will be examined. This section is crucial in that those opposed to the use of federal troops within the United States, and especially military intelligence capabilities, cite the Posse Comitatus Act as justification to keep federal military troops from being used domestically. Understanding the events, debates and outcomes of the those events, as well as the Posse Comitatus Act and the circumstances that surrounded the legislation’s passage, will help frame the debate on the use of military intelligence capabilities in a Title 10 status to support law enforcement in counterdrug and counterterrorism operations and investigations.

Background and Historic Events

Whiskey Rebellion

The Whiskey Rebellion and how the federal government handled it validated the legal framework laid out in the Judiciary and Militia Acts. The discussions between the founding fathers of the Constitution ensured that the use of the military in domestic situations met the intent of what the Constitutional framers had in mind.

The origins of the Whiskey rebellion actually start in 1791 as Congress and the Washington Administration debated how to raise revenue for the young republic. The debate went deeper than the Executive Branch verses the Legislative branch, to the philosophical beliefs of Republicans verses Federalists, and states' rights verses national rights.⁸ Along with this, Americans continued the resistance to taxes after the revolution from their state legislatures, as well as before the revolution from the Monarchy.⁹ This resistance was due to the English tax system, which possessed arbitrary powers to arrest tax evaders and confiscate goods for back taxes without jury trials, and power to search for tax valuations without the owner's permission.¹⁰ The strategic effect of taxation was offensive, as it gave the government power to examine personal property to be taxed.¹¹ Inherent in this authority was the use of military to enforce compliance and the law.¹²

Congress sought to avoid direct taxation on goods, seeking to employ a combination duty and excise "morality" tax on alcohol production.¹³ The tax passed when the federal government agreed to assume all state debts from the War.¹⁴ Some opposed a strong federal government, such as William MaClay of Pennsylvania, and publicly described the tax as an attack on states and liberty.¹⁵ The tax set the stage for major resistance to federal authority.

The Whiskey rebellion of 1794 gave the new government its first test of the Judiciary Act and Calling Forth Acts. Farmers in Western Pennsylvania violently protested a new excise tax on locally distilled whiskey. The local farmers saw this as both an economic attack (how farmers chose to process and market their crops) and a discriminatory tax (the populace of Scott-Irish descent commonly made and consumed

whiskey).¹⁶ When the government sought to collect the tax in the summer of 1794, the local farmers responded by arson, burning the tax collector's home.

These events caused bitter debate within the Washington Administration on the use of force to enforce compliance. The debate focused more on how to suppress the rebellion, not if to suppress the rebellion.¹⁷ The Federalists, led by Alexander Hamilton, sought to use this incident to show that the new government could and would enforce the law on its citizens.¹⁸ On the other hand, the anti-Federalists (Republicans) never called for the federal government to be completely powerless to use military force in domestic disorders.¹⁹ Edmund Randolph, the Attorney General, cautioned against over reacting and stressed the backing of public opinion as crucial to any government action.²⁰

Washington sided with Randolph's logic, even while executing Hamilton's plan.²¹ The Washington Administration understood the strategic effects of using force to enforce the law, or have the government collapse. The Washington Administration balanced this view with needing public opinion behind the use of federal troops or that use of federal troops would create more rebellion.²²

When negotiations failed to peacefully end the rebellion, the citizens in western Pennsylvania made preparations for armed resistance.²³ This resulted in President Washington sending 13,000 troops from three neighboring states and Pennsylvania to restore order. This action established the federal government's authority to use military force to enforce the laws of the young nation, which ties to this thesis in that it established the constitutional and legal foundation for military intelligence to support law enforcement.²⁴ The action was significant in that it had public support, important for a young nation that just threw off what they perceived to be tyrannical military force used

to enforce tax collection. This had to be balanced with the knowledge that “conditions surrounding the use of force can divide or unite a community, and undermine a government.”²⁵

In effect, the incident established the basis for using military force to enforce the laws of the land. While initially intending only to use the militia of Pennsylvania, the course of action proved fraught with obstacles, not least of which was the reticence of the Pennsylvania governor to use his militia to subdue the rebellion.²⁶ In the end, the militias of four states, mobilized under what we now call Title 10 authority, marched into western Pennsylvania, with the public’s backing, even though the rebellion died out before the troops actually arrived.²⁷ The President’s order to the forces charged to quell the rebellion stated that once initial peace was restored, the military was to act in support of, not independent of, law enforcement.²⁸ It is clear from the text that when the military is used to quell a domestic disorder, the military is to be subservient to the duly appointed law enforcement in the affected area.²⁹

The incident validated both the Judiciary Act and Calling Forth Act as appropriate for the new nation in the way President Washington handled the incident within the framework of these laws. In the 1795 update to the Calling Forth Act, Congress changed the law so that the President did not have to notify an associate justice or district court justice in advance of using military force to quell a rebellion or insurrection.³⁰ In doing so, Congress also showed its approval to the handling of the situation and the use of military force.

The Congress understood the possibility of the Army running amuck, and inserted strong language in the law to deter, and if not deter, to punish, abuses.³¹ This applies to

military intelligence support in that those who use military intelligence capabilities in a domestic capacity illegally, including those within military intelligence units, face criminal penalties for that illegal use.

The results of the Whiskey Rebellion and updates to the Calling Forth (Militia) Act laid precedence for what the constitutional framers had in mind by having the military support civil authorities within the United States. The incident set the precedence of the military working in support of law enforcement, not independent of it. The debate addressed the use of federal forces, or the National Guard in what is now considered a Title 10 role, as opposed to the Guard being under state control, in this law enforcement support role.

Tax Rebellion of 1799

President John Adams used this law to quell a tax rebellion in eastern Pennsylvania in 1799. The Adams Administration imposition of a one year tax, passed thru Congress, to finance a possible war with France precipitated this rebellion.³² The major change in tactics between handling the Whiskey Rebellion and this rebellion was the use of Regular Army troops along with the militia to quell the rebellion.³³ However, President Adams did not receive public praise for his handling of the situation. President Adams, his War Secretary, and the Commanding General of the Forces that subdued the rebellion did not fully develop and understand the situation to begin with, and subsequently overreacted.³⁴

Nevertheless, Congress did not register any complaints concerning the Adams Administration's handling of the rebellion that affected legislation. In fact, Congress in 1807 passed a law expanding the president's ability to call upon all land and naval forces

in dealing with rebellions.³⁵ The main impetus for this new law was James Madison's legal opinion written in 1806 that Regular military forces could only be used on campaigns that targeted foreign countries, when President Jefferson sought to use federal troops in a 1806 rebellion.³⁶

This 1799 employment and subsequent congressional legislation codifying the use of active duty federal troops in domestic disorders reinforced President John Adams' use of active duty troops in a domestic disorder in 1799. This congressionally legislated use of troops domestically is the legal basis for military intelligence capabilities in a federal control status (when they came into being) to support law enforcement in counter-narcotics and counterterrorism.

Fugitive Slave Act through Reconstruction

The next major change to the use of military troops resulted from the Fugitive Slave Act of 1850. The change was not so much the legislation, but the second and third order effects of the legislation. The Act was to guarantee the return of slaves to their owners if arrested and allowed the marshal to form a posse comitatus to facilitate the slaves' return.³⁷ When citizens in Pennsylvania and Massachusetts refused to honor the posse and release fugitive slaves, marshals and southern politicians lobbied the President to use federal troops to enforce the law.

The changes started when Secretary of War Conrad established the Cushing Doctrine in 1854.³⁸ The Cushing Doctrine allowed for a federal marshal, unable to execute his duty due to stronger opposition than he can handle, to enlist the armed forces or militia into a posse comitatus.³⁹ The Senate Judiciary Committee sided with the Fillmore Administration's Cushing Doctrine.⁴⁰ The end result of this was that over the

next twenty-seven years, marshals somewhat routinely called on the military to be in a posse comitatus, without having to go through the president to do so. This precedent prior to the Civil War had repercussions in the reconstruction era afterwards.

After the conclusion of the Civil War and the assassination of President Lincoln in April 1865, Vice President Johnson, a Southern Democrat from Tennessee, inherited the responsibility for restoring the Confederate States to the Union. President Johnson appointed many former confederates to administer the Southern State governments, which gave the Confederates an opportunity to work within the system to limit the rights of Blacks.⁴¹ President's Johnson's vision for the federal military troops was to gradually cede control of the southern governments as the "reconstituted" civilian governments organized, offering minimal interference unless requested by the state or local civilian governments.⁴² However, this approach resulted in the Southern states passing "Black Codes", creating conflict with Army leaders attempting to implement federal law.⁴³ President Johnson hindered the Army's efforts to maintain order and provide justice to the freed Blacks, which created conflict with Congress in December 1865.⁴⁴

In 1866, Congress passed the Civil Rights Act, granting expanding rights to Blacks, trumping the Black Codes passed in the South. This Act contained a virtually identical clause listed in the 1850 Fugitive Slave Act of 1850 that stated the President could use the military to enforce it.⁴⁵ Also, by using mostly the same language as the 1850 Act, which white Southern Democrats cited in their demand to use federal force to enforce the 1850 Act, the Republicans eliminated any legal or rational basis to arguments the Southern Democrats could raise against the Civil Rights Act.⁴⁶ The Civil Rights Act still maintained that the military worked under the civilian law enforcement component,

placing responsibility with the federal courts and marshals, but eliminated the need for the request to go to the President.⁴⁷ This kept the earlier precedent of the 1850 Act and subsequent use of the military by marshals.

The use of federal troops expanded following the proposal of the Fourteenth Amendment. Matthews notes that General Order No. 44, issued in July 1866, expanded the Army's role further by allowing the Army to act in a law enforcement capacity when local or state law enforcement fails to act in their capacity.⁴⁸ The War Department General Order No. 44 placed the military in a direct law enforcement role apart from civilian authority, in that they were to do the civilian law enforcement authorities' jobs when those civilians abdicated their responsibilities.

Congress expanded military authority in the South by giving military commanders the ability to remove any official derelict in their duties and had the Army enforce the law while under military rule.⁴⁹ This resulted in Republicans gaining control of the Southern States, fulfilling the requirements to be readmitted to the Union, and thus allowing the Army to finally turn over control to the civilian governments and release its enforcement mission.⁵⁰ However, Southern Whites formed the Klu Klux Klan, as well as other like-minded groups such as the Red Shirts in Carolina, and resorted to terror campaigns to intimidate Blacks and sympathizers to hinder racial equality. As Southern Republican state governments requested the use federal troops to help them combat the Klan from the President, President Johnson's Attorney General reaffirmed that a federal marshal could request the Army to be in a posse comitatus and that soldiers must follow the orders of the marshal when serving in a posse.⁵¹ The Klu Klux Klan Act of 1871 greatly increased

the use of the Army in a posse comitatus role in an effort to stamp out the Klan in the South.⁵²

These laws affecting the Army's role as separate from being subordinate to law enforcement were unique in the history of the United States, in that the state and local government refused to follow or enforce federal laws. Although the Army's role lasted several years, the Army eventually turned the law enforcement role back over to state and local civilian control once the state and local governments would enforce law and order. What this section of history shows is that political motivations in Congress greatly influence the role that the Army plays in supporting, or during Reconstruction supplanting, law enforcement. Hence, much of the criticism directed against the Army's role in supporting law enforcement is a result of a lack of understanding on the federal legal statutes either permitting or prohibiting Army actions in a law enforcement support role, as opposed to abuse of power by the Army.

The Klu Klux Klan Act of 1871 marked a turning point where Southern Democrats began to make gains in federal elections, eventually winning Democrats a majority in Congress in 1874. After the elections of 1876, Democrats possessed a firm grasp on Congress and passed the Knott Amendment, which became known as the Posse Comitatus Act.⁵³

The Posse Comitatus Act

The Knott Amendment, otherwise known as the Posse Comitatus Act, as passed in the 1878 Army Appropriations bill 20 Stat. L., 145, Chapter 263 on June 18, 1878 reads as follows:

SEC. 15. From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section. And any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.⁵⁴

This was later codified as Title 18 United States Code (USC), Section 1385 and expanded to include the Air Force. The Navy and Marines fall under a similar provision in Title 10, USC, Section 375.⁵⁵

The Act did not constrain the use of the military for civil disturbances, counterterrorism and the like, but established parameters and guidelines for their use.⁵⁶ The *New York Times* of the day lambasted the Congressional move as “a move against economy and efficiency, as well as against principle and precedent.”⁵⁷ The Posse Comitatus Act eliminated a recent practice founded on opinion verses statutory or case law.⁵⁸ Title 10 USC, Subtitle A, Part I, Chapter 15, Section 333 is much clearer on giving the president the authority to use federal military force to quell insurrections, civil disturbances and as the president deems necessary to protect the peace.⁵⁹ When considering this, one can deduce that Congress did not intend for the Act to be overly restrictive, but to restore what was precedent from the period of the country’s founding to about 1850, that the request for use of the military in a law enforcement role must go to the president to approve.

As listed out in the preceding sections, the military was reduced by Congressional fiat to be an on call posse for federal marshals. The Fugitive Slave Act did remove the committing of federal troops for domestic insurrections from Presidential responsibility,

as clearly the Fugitive Slave Act went against what the founding fathers and congressional legislation of the late 1700s and early 1800s envisioned. While ostensibly written to keep Army soldiers from compulsory law enforcement service in the South, a plain observation of the circumstances indicates that Southern politicians did not like being on the receiving end of the policy they enacted through the Fugitive Slave Act.⁶⁰ Congress did not vote to preclude the use of troops if authorized by the president or Congress, as the military was used at least fifty times after the Posse Comitatus Act was signed into law, mostly dealing with quelling violent labor strikes.⁶¹ The president employed troops to quell riots and civil disorders in over 200 instances for the period 1795 through 1995.⁶² The Posse Comitatus Act does NOT apply to the following:⁶³

- Applies only to the Army and Air Force.
- Does not apply to the Navy and Marine Corps. [*However, the Department of Defense has consistently held that the Navy and Marine Corps should behave as if the act applied to them.*]
- Does not apply to the Coast Guard, which both an armed force and a law enforcement agency with police powers.
- Does not apply to the National Guard in its role as state troops on state active duty under the command of the respective governors.
- May not apply to the National Guard (qua militia) even when it is called to federal active duty (Title 32 status).⁶⁴
- Does not apply to state guards or State Defense Forces under the command of the respective governors.
- Does not apply to military personnel assigned to military police, shore police, or security police duties.⁶⁵
- Does not apply to civilian employees, including those who are sworn law enforcement officers.
- Does not prevent the President from using federal troops in riots or civil disorders.

The Posse Comitatus Act did not prevent the use of federal troops if properly requested and the president approved the mission.⁶⁶

The Secretary of War George McCrary in 1877 offered the following analysis regarding the Posse Comitatus Act: “[The Act should be] repealed, or that the number of cases in which the use of the Army shall be ‘expressly authorized’ be very much enlarged.”⁶⁷ Several laws passed by Congress allow specific exceptions to the Posse Comitatus Act beginning with the 1903 Dick Act. Some of these laws that further widen the scope of use for the military under the Posse Comitatus Act are discussed later in this work. The Dick Act renewed the president’s ability to federalize the National Guard if regular Army troops were not available to quell insurrection and execute the laws of the union.⁶⁸ In effect, this law began the fulfillment of what George McCrary surmised following the passage of the Posse Comitatus Act.

The Posse Comitatus reset the legal landscape to pre-1850 standards, which means the President is the one to commit federal troops to domestic situations. Congress did modify this legal precedent by allowing itself to grant exceptions to the president’s authority in committing federal troops domestically. However, this is the same rationale behind the 1850 Fugitive Slave Act, to circumvent the president’s responsibility and commit forces without his order. In this manner, the Posse Comitatus Act, while removing a carte blanche for law enforcement use, left the door open to Congressional use of troops in domestic situations.

Intelligence

Military Intelligence Development

Prior to World War I and during the interwar period, all commanders were expected to serve as the own intelligence officers.⁶⁹ The first official intelligence divisions began with the Navy, which instituted an intelligence department in 1882,

followed by the Army in 1885, which began the Division of Military Information.⁷⁰ In World War I, the Army formed the Military Intelligence Division (MID).⁷¹ The fate of the Army MID ebbed and flowed with the wars, growing in anticipation or because of conflict, and shrinking when the conflict ceased. The Korean conflict demonstrated the need for a sustained intelligence apparatus to monitor the Communist threat.⁷²

While the military intelligence organization as a whole went through several expansion and contraction periods, it still managed to get heavily involved in domestic collection, aside from the Posse Comitatus Act. During World War I, military intelligence focused domestically on the counterintelligence mission, as the War Department worried about the immigrants from Europe with ethnic backgrounds of the Axis Powers, racial tensions, and the antiwar movement.⁷³ Civil authorities lacked the capability to identify, track, and assess these perceived threats, so the Army built a major counterintelligence program to perform this mission within its ranks and encouraged soldiers to spy on each other.⁷⁴

As the Military Intelligence branch expanded, it divided missions among numbered branches. MI-3 assumed the role of counterespionage in the military, while MI-4 focused on civilian based espionage, labor disputes, racial unrest, and immigrant alienation in the eastern cities, which compelled MI-4 to actively liaison with civilian law enforcement entities.⁷⁵ MI-4 still lacked the manpower to fully investigate potential threats, leading MI-4 to assume control over the American Protective League, a civilian vigilante spy group created by the Department of Justice, whose mission was to uncover spies.⁷⁶ This combined element under MI-4 allowed the Army MID to provide intelligence to federal troops deployed in the United States to keep key materials moving

and industry running for the war effort.⁷⁷ This MI-4 branch of Army intelligence is the first dedicated domestic military intelligence support apparatus, and shaped intelligence support to domestic law enforcement through the early 1970s.

The Army did not work in support of civilian authorities during this period. The Army worked with the Department of Justice in a limited manner, only concerning the American Protective League. The War Department under Newton Baker suspended the Posse Comitatus Act in May 1917, the justification being that the nation needed a steady stream of material for the World War I war effort.⁷⁸ Although Army leaders were instructed to “be in concert with the actions and views of duly constituted civil authorities,” the evidence indicates this did not always take place.⁷⁹ This directive seems to indicate that Secretary Baker understood the military’s role as a support to law enforcement, not a supplanting of it. However, it appears that his understanding did not convey to the military leadership of the time. As discussed in Chapter 5, law enforcement today understands and would welcome military intelligence support under the guidelines Secretary Baker espoused.

The War Department authorized military commanders to arrest civilians, which often drew on the MID investigative data for intelligence of the area instead of the civilian authorities, the arrests being in spite of the Ex Parte Milligan Supreme Court doctrine of 1866.⁸⁰ During 1918, MID took over the military censorship program.⁸¹

MID’s investigations did not solely focus on law enforcement. MID played labor organizations against rival organizations, so the labor organizations spent more time battling each other than interfering with the material production.⁸² Army MID was deliberately anti-radical and anti-labor, which gave the impression that all Army troops

were the same.⁸³ Army MID attempted to set policy in the labor movement by meddling in its attempts to organize. Consequently, the second order effects of this posture may have caused, or at least contributed, to intelligence problems in later years for the Army. These activities did not conform to Secretary Baker's guidance, and therefore removed the Army from the civilian leadership umbrella.

After World War I, the focus turned to a concern of Bolshevism's spread into Western Europe and potentially the United States. Where during the war many Army officers disliked domestic intervention, after the war during the Red scare, they came to view domestic intervention as necessary to protect the nation and the military.⁸⁴ However, this new "willingness" to intervene in domestic disorders brought accusations from labor groups that the Army was only playing on public fears of Communism to maintain its funding levels.⁸⁵ MID's perception of labor was that it was under the control of foreign radicals and their philosophies.⁸⁶ This perception is evidenced by MID's intelligence reports on the Seattle shipyard strike, in that MID reported the speeches were plainly radical.⁸⁷ However, MID's intelligence on the "suspected" radicals was mostly based on hearsay, not hard facts or corroborated intelligence.⁸⁸ Note that intelligence must be corroborated, which it appears the MID failed to do, based on the historical record. This failure, and the possible lack of self or external analysis to identify and correct this deficiency, set the MID up for problems in later years.

Army intervention was not confined to labor disputes, but also racial disputes. Army MID agents worked the crowds in civilian clothes to gather information on the rioters for the commanders of the federal forces employed in riot duty.⁸⁹ MID amassed a large database of information on racial disturbances and blacks in general during the

1919 to 1921 riots.⁹⁰ However, MID's assessment of the racial situation shows its own racist bias, calling the situation a negro subversion, a work of radical labor and socialists, verses blacks wanting equality as promised by the Civil Rights Act of 1865.⁹¹ This only reinforces the possible lack of corroboration, and suggests that MID played more to public fears than actual intelligence. In this the MID failed to adequately support law enforcement with good intelligence, and provided questionable support to the Army. Although MID did have active liaison and information sharing with law enforcement, its bias, and uncorroborated reporting did not help law enforcement to adequately identify threats for investigation.⁹²

Despite the biased intelligence provided by MID, the Army as a whole performed with fairness to both sides of the dispute, whether labor or racial.⁹³ Thus, the age of active military intervention, especially military intelligence collection against United States Civilians, greatly decreased until World War II following the rigid controls placed on it by the Constitution and Congress.⁹⁴

With the reimplementations of the Posse Comitatus Act in late 1921, Army MID sought to assist with contingency plans for domestic insurrection, including acquiring foreign military plans to handle insurrections in their respective countries to use as a guide.⁹⁵

The FBI, Army MID and naval intelligence all signed an agreement on the responsibilities of collection on United States citizens in June 1940, and again in 1942 and 1949, to limit the virtual carte blanche military intelligence had in World War I investigations on United States citizens.⁹⁶ While the FBI had the lead on domestic intelligence, the military was allowed "to investigate civilians employed or controlled by

the military in the continental United States and all civilians in the Canal Zone and the Philippines.”⁹⁷ To accomplish its part, the Army MID greatly expanded its Corps of Intelligence Personnel (CIP), where it focused on military personnel, developing an extensive “spy network” of operatives in military units that would file monthly reports on possible subversive activity.⁹⁸

The military intelligence community largely stayed out of supporting labor and racial interventions during World War II.

The National Security Act of 1947 combined the Department of War and the Department of the Navy, and birthed the Department of the Air Force from within the Army Aviation Corps, all under the umbrella of the newly created Department of Defense (DoD). More significant to the military intelligence community, it created the Central Intelligence Agency (CIA) and included the DoD intelligence community into the whole of government intelligence community. The National Security Act of 1947 defined a United States person and law enforcement agency (LEA).⁹⁹ Both definitions govern the convergence of foreign intelligence information and criminal investigation information and the corresponding exchange of that information between the intelligence community and the Department of Justice.¹⁰⁰

Furthermore, the National Security Act of 1947 laid out some specific limitations on the use of military forces in domestic roles. Finally, the National Security Act of 1947 set up a framework for interagency support.

In addition to the CIA, the National Security Agency (NSA) and the Defense Investigative Agency (DIA) came into being from 1947 to 1961 as a result of the Cold War.¹⁰¹ The CIA coordinated federal intelligence activities, as well as produced and

disseminated intelligence while the NSA intercepted foreign communications and coordinated cryptographic operations.¹⁰² The National Security Act of 1947 also defined the intelligence community as including “the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Federal Bureau of Investigation, the Department of the Treasury, the Department of Energy, and the Coast Guard.”¹⁰³ This law set the military intelligence community as part of the overall intelligence community, and made laws governing the intelligence community applicable to the military intelligence community as well. However, the laws which created the CIA and NSA also expressly prohibited them from law enforcement roles, internal security functions, and collection on domestic communications.¹⁰⁴

The military services and the FBI agreed to share with each other the information each party had gathered.¹⁰⁵ This sharing of gathered information had the net result of circumventing the Delimitations Agreement, and laid the groundwork for more blurring of the responsibilities of the Agreement. An example of this occurred during the mid 1950s, where commanders inside the United States had to forward to the Army Chief of Staff for Intelligence and Continental Army Command trends and conditions of possible civil unrest.¹⁰⁶ These reports included information on civilians, organizations, leadership and communications.¹⁰⁷ However, the lack of detail on the gathering of this information implies that Army Intelligence was collecting the information independent of law enforcement, a clear violation of the intent of the founding fathers in that the military was to be subordinate to law enforcement when used domestically.

The National Security Act of 1947 identified some restrictions on military support to law enforcement. First, it set boundaries on the DoD intelligence components to only

conduct independent collection on non-U.S. persons and only outside the United States.¹⁰⁸ However, it did allow for law enforcement to request DoD intelligence assets to collect on foreign nationals, as Joint Task Force–North in El Paso, Texas, does with military intelligence personnel collecting information along the U.S.–Mexican border and associated boundary waters today. Second, the Act prohibited members of the armed forces from directly participating “in arrest or similar activity” of a U.S. person.¹⁰⁹

The National Security Act of 1947 foresaw the need for interagency coordination. Section 113 allows for employees of an intelligence agency to work an assignment at a different intelligence agency for up to three years; and this included DoD intelligence personnel.¹¹⁰ This relates to today with the emphasis in Joint doctrine on supporting the interagency. The 9/11 Commission, formed after the terrorist attacks in 2001, called for increasing the analytical capacity of domestic intelligence agencies.¹¹¹ With the analytical capacity resident within the military, it is prudent for military intelligence professionals to fill the shortages identified by the 9/11 Commission.¹¹² The basis for the doctrine as well as the 9/11 Commission recommendations can be linked back to the National Security Act of 1947, Section 113.

Military Intelligence Domestic Collection in the 1950s and 1960s

The Korean conflict, unlike the two previous wars, did not usher in a large scale operative program to root out communists in the military.¹¹³ Army intelligence collection on U.S. civilians did not happen until the racial integrations standoff in Little Rock, Arkansas during September 1957.¹¹⁴ Army staffers, presumably intelligence personnel, during 1958 also collected information on school integration issues in Arkansas and Virginia.¹¹⁵ No hindrance to the military collection of intelligence on civilians existed in

Little Rock, even though the practice violated the Delimitations Agreement with the FBI and the Army Strategic Capabilities Plan of June 1960.¹¹⁶ As a result, the next racial disturbance in the fall of 1962 at Oxford, Mississippi, did not show evidence of military intelligence personnel collecting on the civil rights marchers, although Army Intelligence was aware of the planning and operations.¹¹⁷ However, General Abrams decried after the Oxford intervention not only the lack of planning and coordination between the military and civilian law enforcement, but the lack of good situational intelligence on the problem.¹¹⁸ In fact, in planning and supporting the next few racial incidents, the Army took pains to ensure they were operating with the Department of Justice as the lead civilian LEA.¹¹⁹

After several racial incidents between the fall of 1962 and spring of 1963, the Army began to evaluate General Abrams recommendations on prior planning, coordination and intelligence development.¹²⁰ General Abrams expressed a real need for commanders to have accurate intelligence and analysis on belligerents, and recommended that the FBI be in the lead for this.¹²¹ The Joint Chiefs of Staff formalized a riot control contingency, Operations Plan 563, in July 1963.¹²²

When Army intelligence collection on U.S. civilians began, it initially was limited to open source and other government agency information.¹²³ The plan did allow for direct emergency intelligence collection to develop the immediate situation, but reserved counterintelligence collection to Commander Continental Army approval after consultation with the FBI.¹²⁴

The Army Intelligence Command, reorganized in 1965, housed the database of all counterintelligence and criminal investigations previously conducted by the military, as

well as a pointer index to FBI and local police department investigative files.¹²⁵ A result of this access to civil disturbance information led the Army Intelligence Command to produce daily intelligence summaries on civil disturbances in 1965.¹²⁶ This began a process where the original mission and instruction gradually violated the Delimitations Agreement and National Security Act of 1947.

This violation happened in part due to the realization that when troop commitment to a particular disturbance was imminent or occurring, it was too late to gather and analyze intelligence data needed by those troops to deploy, as the existing civilian intelligence agencies rarely possessed needed intelligence data.¹²⁷ Much of the issue devolved from the FBI itself, where the Director, J. Edgar Hoover, became much less cooperative with Army counterintelligence concerns in the 1960s.¹²⁸ The FBI lacked the organizational capacity and ability to produce domestic intelligence useful to the Army in civil disturbances, as well as the FBI not having minority and student aged males to infiltrate radical black and student groups.¹²⁹ Although the civilian agencies did not adequately produce domestic intelligence, civilian and military leaders sought to expand the military collection of intelligence to gain the required information, as domestic intelligence production was not a priority to the FBI.¹³⁰

Local Army commanders used counterintelligence personnel in the early 1960s until the Army Intelligence Command was organized after the Watts riots in 1965.¹³¹ The Army Intelligence Command developed a plan to provide counterintelligence support after federal troops deployed to a civil disorder, but found it needed to collect in likely civil unrest areas before troop deployment to be useful to commanders.¹³² Army Intelligence Command developed a new plan to collect in likely unrest areas, and

implemented this plan or its successors twelve times by the summer of 1966.¹³³ This employment of counterintelligence personnel allowed the Army to build models and procedures to meet similar marches and demonstrations across the country.¹³⁴

From 1967 onward the Army intelligence community collected much greater intelligence on the U.S. population. This started with the Deputy Secretary of Defense Cyrus Vance, who tasked the Army to conduct intelligence preparation of the environment on major cities where civil unrest was possible.¹³⁵ This resulted from the assessment of the Detroit riots in the summer of 1967.¹³⁶ All this collection covering both racial and anti-war threats greatly expanded the intelligence database of the Army Intelligence Command.¹³⁷ Indeed, President Johnson named an eleven member panel, the Kerner Commission, to look at the Detroit riots and make recommendations on how to improve the federal response.¹³⁸

The Kerner Commission Report recommended that background packets be developed on civil leaders, which the Army resisted as unconstitutional, since neither the president nor Congress expressly authorized the activity, and it was not in support of and directed by civilian law enforcement.¹³⁹ However, the Commission report played into the expansion of intelligence activities nonetheless in the late 1960s, as Johnson Administration officials sought to gain better intelligence on the civil unrest building throughout the period.¹⁴⁰

The fallout from the assassination of Dr. Martin Luther King, Jr. in 1968 brought the formation of civil disturbance units to the Counterintelligence and Analysis Branches.¹⁴¹ Additionally the Department of the Army greatly expanded the intelligence requirements beyond the scope of the Army Intelligence Command's ability to collect by

liaison with the FBI and overt means.¹⁴² This Department of the Army tasking beyond the Army Intelligence Commands legal ability forced other Army intelligence elements, including the Army Security Agency (ASA) and tactical counterintelligence units, to collect on domestic targets and building databases on their findings in violation of the Delimitations Agreement and the National Security Act of 1947.¹⁴³ An example of this occurred in Washington, D.C., between November 1967 and April 1968, where Army counterintelligence personnel covertly infiltrated the demonstration leadership.¹⁴⁴ In addition, the ASA, directed by the Department of the Army, listened in on the civilian communications of the police, taxi, amateur radio, and citizen bands, despite the ban on the use of the ASA domestically.¹⁴⁵ In subsequent marches during the month following Dr. King's assassination, the Army Intelligence Command worked with a host of federal and local law enforcement entities to monitor the movement and activities of the marchers.¹⁴⁶ However, by 1969 the Army Intelligence Command was doing independent collection on radical antiwar and racial groups to uncover military subversion, as the FBI abdicated its responsibility to do the mission on perceived "safety" grounds.¹⁴⁷ The result is that Army Intelligence crossed the line and broke the law, since Congress did not authorize either the collection of information on U.S. citizens or the data basing of that information.¹⁴⁸ In doing so the Army moved out from under the support to law enforcement role, and violated the due process rights of the citizens they collected information on.

The Army did not act independently of civilian authority, as it was directed by the Kennedy, Johnson, and Nixon Administrations to gather the data. However, it did not conduct a sizable portion of intelligence collection under the direction of the civilian law

enforcement authorities, most notably the FBI, per the Delimitations Agreement. While one could argue that since the Department of Justice was involved, the intelligence community did act under the supervision of civilian law enforcement. However, the intelligence community still violated federal law as it moved away from law enforcement support to independent collection on U.S. citizens.

Congress passed Public Law 90-331, granting exception to the Posse Comitatus Act for the military to support the Secret Service in protecting the President, Vice President, and major presidential candidates if the candidates requested federal protection.¹⁴⁹ As a result, Army intelligence, along with many other military functions, supported the Secret Service during both the Republican and Democratic National Conventions in 1968.¹⁵⁰ This continued into 1969 as well, as Army intelligence supported the FBI in collecting intelligence on anti-war protesters.¹⁵¹

During the first year of the Nixon Administration senior defense leaders began to question the Army's domestic collection activities. However, their questioning did not readily translate into changes to the Army collection effort, and in some cases expanded it during 1969.¹⁵² Memoranda between the Department of Justice and the Department of the Army in 1969 sought to shift the collection burden back to the FBI.¹⁵³ However, the Interdepartmental Action Plan for Civilian Disturbances failed to lift or reduce the burden on Army Intelligence in the domestic intelligence role.¹⁵⁴ Even the outgoing Under Secretary of the Army David McGiffert saw that the Army might develop intelligence activities beyond the scope needed for civil disturbance support, and stated this via memorandum to the Vice Chief of Staff.¹⁵⁵ Nevertheless, a lawsuit filed by the American Civil Liberties Union in 1970 accusing the Army of spying ultimately exposed the

program to public scrutiny and political backlash, effectively ending the independent collection on U.S. citizens.¹⁵⁶

The use of Army intelligence during the 1950s and 1960s by political leaders increased to the point that the Army broke the law in collection on U.S. citizens. This was partly due to lack of civilian law enforcement leadership to take responsibility for the mission, a mission that played to the military's prejudices, and a lack of Congressional oversight to ensure that support authorized by the National Security Act of 1947 was not abused. The Army, being subservient to civilian leadership, relies on that civilian leadership to ensure it does not get tasked to perform beyond its legal boundary. Civilian governmental leadership's failure to provide effective and specific direction, oversight, and accountability opened the door for abuse as military leadership focuses on accomplishing the mission. The public's perception of the misuse of the military in a civilian law enforcement role fueled the mistrust of the military as well as big government due to the government's involvement in subverting the anti-war movement, along with racial and labor tensions. This set the stage for major backlash in Congress as these abuses came to light.

Congressional Hearings and the Foreign Intelligence Surveillance Act

In 1970 a former Army intelligence captain, Christopher Pyle, publicized the Army's domestic intelligence collection activities.¹⁵⁷ Pyle wrote a dissertation on Army Surveillance and concluded the effort evolved from bureaucratic processes verses being driven from the top or a deliberate attempt to skirt around legal obstacles.¹⁵⁸ This resulted from a failure of the FBI to provide adequate intelligence support per the Delimitations Agreement.¹⁵⁹ This disclosure proved to be a watershed event in that it was the beginning

of several disclosures on the government's intelligence apparatus collecting information on legal civilian activities, as well as covert collection on potentially illegal activities of political groups and non-political groups advocating agendas. Following disclosures would encompass the FBI, the CIA, and Watergate, and resulted in the Ervin, Nedzi, Church, and Pike Congressional Committees hearings.¹⁶⁰ However, as the Nedzi Commission did not produce any reports and disbanded for internal political reasons, it will not be discussed in this thesis.¹⁶¹

Pyle characterized the Ervin committee hearings as intending to protect the military from being politicized and drawn into domestic politics.¹⁶² To that end, Senator Ervin referred to the hearings as "Computers, Data Banks and the Bill of Rights," commonly referred to the Ervin Committee, verses Army Surveillance hearings.¹⁶³ However, Senator Ervin also viewed the Army domestic surveillance program as part of a much larger assault by an activist government on the constitutional rights of individual Americans.¹⁶⁴ The Treasury Department monitored what books Americans checked out at libraries; Secret Service tracked who wanted personal contact with high government officials or attempted to embarrass the President; the Department of Health, Education and Welfare maintained a list of scientists who opposed the Vietnam War; and the Postal Service (later found to be the Central Intelligence Agency (CIA)) that illegally opened the mail of individual Americans.¹⁶⁵ While Senator Ervin first concluded the Johnson Administration developed the Army Surveillance program, the Senator understood during the Watergate hearings that the Nixon Administration expanded the program.¹⁶⁶

The Ervin Committee brought to light some outlandish Army surveillance acts. The more bizarre ones included infiltrating a church Youth group and requesting that

high school and college faculty pass names of individuals considered “potential trouble makers” to the Army.¹⁶⁷ According to the Hearings, the Army conducted purely political surveillance as well, such as elected officials and bodies that either disagreed with the Vietnam War or investigated the race riots of the 1960s.¹⁶⁸

The Nixon Administration admitted to limited abuses in the overall federal domestic program through the Department of Justice witness, William Rehnquist.¹⁶⁹ Senator Ervin’s Committee uncovered the basic issue of how easily a secret domestic surveillance system could grow beyond constitutional limits, especially when it was not subject to Congressional oversight.¹⁷⁰

The Ervin Subcommittee did not produce a final report and failed to produce any legislation to curb the domestic spying programs of either the Army of Justice Department.¹⁷¹ However, it did expose the Army as independently collecting intelligence on civilians, a violation of what the founding fathers envisioned when writing the Constitution and laws up to the Civil War. In a limited number of instances civilian law enforcement requested the Army’s assistance in the collection of information, but these requests did not have presidential or Congressional express authorization. Therefore, these requests laid outside the scope of the Posse Comitatus Act or exceptions authorized by Congress to the Posse Comitatus Act.

The Ervin Subcommittee hearings impacted the military intelligence’s role in support of domestic law enforcement as it prompted some civilian leaders in DoD to look at the Army’s domestic intelligence activities and place some curbs on them. The hearings caused the Army to begin destroying some of its domestic databases, albeit in an effort to cover up the extent of the domestic spying operation.¹⁷² In addition, the DoD

issued new guidelines that called for the military to rely on Department of Justice information for its needs to prepare for civil disturbances, halting the Army's independent collection against American civilians.¹⁷³ In light of the lack of express authorization by the President or Congress, these actions were fitting and began the reigning in of military intelligence support to domestic law enforcement, even if not completely adherent to the Congressional intent against domestic military intelligence databases.

The next round of investigation into intelligence violations by the military came from the Rockefeller Commission, appointed by President Ford and chaired by his Vice President, Nelson A. Rockefeller, in January 1975.¹⁷⁴ While the Commission's focus was the CIA, other related activities in other departments also came within the purview of the commission in an ancillary fashion.

For the most part, the CIA complied with federal law and statutory authority.¹⁷⁵ Where the CIA violated federal law of its own accord, the Commission admonished the CIA to adopt more stringent controls to prevent recurrence.¹⁷⁶ The Commission affirmed the CIA and inferred approval of other intelligence components with assisting state and local law enforcement authorities on new techniques, ideas, and equipment, as long as it did not involve CIA personnel in a law enforcement role.¹⁷⁷ Along with this, it affirmed the coordination, production, and sharing of intelligence with other federal state and local authorities, as long as the non-CIA intelligence is kept out of the CIA databases.¹⁷⁸

This guidance is applicable to the military intelligence apparatus as well, as Senator Ervin's Committee sought to remove non-military related intelligence from DoD systems. The Rockefeller Commission recognized that civilian law enforcement,

including the FBI, did not have the requisite analytical capability that the CIA and military possessed.¹⁷⁹ Therefore, it did not fault the analytical assistance provided by the CIA and military. While the Commission did recommend that the Department of Justice develop an analytical capability, it did not recommend that the CIA or military stop providing analytical assistance, nor limit military coordination with law enforcement, as the Commission recommended a deputy of the CIA be a military officer.¹⁸⁰ Clearly the commission expected the CIA and DoD to collaborate on intelligence, so it is logical to assume the recommendations for the CIA to operate within statutory authorizations also apply to the military.

The House Committee formed under Otis Pike and set about to examine the effectiveness of the CIA and its costs.¹⁸¹ The Pike Committee hearings did not have a domestic intelligence collection focus so will not be covered in depth here. While the full House voted not to release the Pike Committee report without Presidential certification of sanitization, one of the committee members or staff members leaked the entire report to the New York Times and a European paper.¹⁸² Aside from not having the Pike Committee report officially released, the main recommendation of the Pike Committee was to establish a standing committee on intelligence, which the Church Committee also made.¹⁸³

The Senate Committee led by Frank Church ran concurrently with the Nedzi and Pike Committees in the House and produced the only officially released report concerning the intelligence community's activities. The Church Committee's findings concerning the CIA closely resembled that of the Pike Committee, and did not mention much about the CIA and domestic surveillance, so they will not be covered here. The

section of the Church Committee that pertains to this thesis concerns the military's involvement in domestic surveillance. The NSA activities also bear on the military, as the NSA took responsibility for the military cryptographic functions in 1952.¹⁸⁴ Since the Army Security Agency still maintained an electronic collection capability, the NSA review has an ancillary effect on Army electronic collection activities domestically.

The Church Committee found that the military service's intelligence departments from about 1967 on "were called upon to provide extensive information on the political activities of private individuals and organizations throughout the country."¹⁸⁵ The Church Committee found that prior to 1967 the Army gained most of its intelligence from passive sources such as LEAs, the FBI, and the news media, instead of collecting the information with counterintelligence personnel, which is considered an active source.¹⁸⁶ As the number of riots increased in the late 1960s, the Army began to collect more information on potential riot locations itself, predominately at public gatherings (although in a covert status), and maintained a database of this information for potential federal troop deployments.¹⁸⁷ While the Church Committee declined to imply that Title 10, United States Code, Sections 331-334 authorized the military to collect information on American citizens, the U.S. Supreme Court held a different view.¹⁸⁸

The federal case *Laird v. Tatum* concerned the plaintiff's claim that the existence of an Army intelligence collection and subsequent database on American citizens had a chilling effect on the free speech of the persons in the database.¹⁸⁹ The U.S. Supreme Court held in a five to four decision that "the mere presence of this [Army] data-gathering system [containing information on American citizens] does not show justiciable

controversy on the basis of the record in this case.”¹⁹⁰ In making its decision, the Court held:

In performing this type function, the Army is essentially a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances, the Army needs the same tools and, most importantly, the same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman.

No logical argument can be made for compelling the military to use blind force. When force is employed, it should be intelligently directed, and this depends upon having reliable information—in time. As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information. . . .' So we take it as undeniable that the military, *i.e.*, the Army, need a certain amount of information in order to perform their constitutional and statutory missions.¹⁹¹

The Court also recognized that the Army collected most of the information from news media, circulated publications, and civilian LEAs.¹⁹² The information the Army collected by attending public meetings, including names of people, organizations, speakers and topics and attendance, did not constitute illegal or unlawful surveillance activities, as any news reporter could and would do the same to gather similar information.¹⁹³ The Court cited several cases where the justiciable harm met the threshold, but noted that the “chilling effect” in these cases was much clearer than in *Laird v. Tatum*.¹⁹⁴

The dissenting minority took issue of militia verse federal forces as written in prior legislation.¹⁹⁵ However, dissenting opinion did not address that in practice the federal forces were used like a militia for 170 years, but made the argument that the practice of using federal troops as a militia is illegal. In addition, it recognized Title 10, U.S.C. Sections 331-334, but declared these statutes are insufficient to warrant a military domestic surveillance program.¹⁹⁶ *Laird v. Tatum* did not cite the electronic surveillance activities of the military.

This case defined that passive measures performed by the military, such as open source collection and sharing information with law enforcement via liaison is legal. The Court plainly stated that the Army must be allowed to prepare for a deployment domestically and needed accurate intelligence to make those preparations.¹⁹⁷ Databases do not infringe on the rights of citizens, nor do they show justiciable arm. One other court case also bore on the use of the military in support of law enforcement.

In the winter and spring of 1973, members of the American Indian Movement (AIM) seized Wounded Knee, Pine Ridge Indian Reservation, South Dakota, and held it in a standoff with law enforcement for over two months.¹⁹⁸ The National Guard of four states provided reconnaissance, equipment and the soldiers to maintain the equipment, while the Department of Defense placed the Guardsmen on temporary federal status so the Guardsmen could operate on the federal reservation.¹⁹⁹ The Army provided planning, advisors (in civilian clothes), and communications to support the federal LEAs.²⁰⁰ Once the standoff ended, the defense attorneys for AIM accused the government of violating Posse Comitatus through the support they provided to law enforcement.²⁰¹ The Federal Court for the district of South Dakota issued its ruling on the matter 7 April 1975.

The Court found that the support provided at Wounded Knee did not violate the Posse Comitatus Act, notwithstanding any use of troops for active enforcement of law.²⁰² The Court cited Congressional legislative history and found that Congress did not intend to prohibit use of military material or equipment by civilian law enforcement in civil disorders, and cited the Economy Act of 1932 as additional proof of this.²⁰³ The Court went further to state that:

Congress did not intend to make unlawful the involvement of federal troops in a passive role in civilian law enforcement activities. Other courts have made the same distinction in construing the clause 'to execute the laws.' In *Burns v. State*, 473 S.W.2d 19 (Tex.Crim.App.1971), the Court held that assistance provided by military criminal investigators to law enforcement officers did not violate 18 U.S.C. § 1385.²⁰⁴

The Court went on to define both the active role that is illegal under 18 U.S.C. § 1385 and the passive role allowed by this same statute:

[*Active Role* -] Activities which constitute an active role in direct law enforcement are: arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities.

[*Passive Role* -] Activities which constitute a passive role which might indirectly aid aerial photographic reconnaissance military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel . . .; military personnel to deliver military material, equipment or supplies, to train local law enforcement officials . . .; aerial photographic reconnaissance flights and other like activities. Such passive involvement of federal military troops which might indirectly aid civilian law enforcement is not made unlawful under 18 U.S.C. § 1385.²⁰⁵

This ruling is nested within the Supreme Court ruling in *Laird v. Tatum*, in that it defined further what passive support the military could provide. Based on the historical references and definitions laid out by the federal circuit court and U.S. Supreme Court, military intelligence support to civilian law enforcement is authorized in the following missions: analysis, assessments, translation, aerial reconnaissance (unmanned aerial vehicle support), intelligence training, law enforcement database mining (law enforcement owns the information in the databases, which are kept at the LEA), collection planning, and execution of the passive measures of the collection plan once law enforcement obtains proper legal process (if needed).

The Church Committee took up the issue of the Army monitoring radio transmissions inside the United States. In this the Committee compared the Army mission of collection, jamming and deceptive transmission to the 1934 Communications Act, Section 605, and noted that publication of intercepts is a crime.²⁰⁶ The Committee looked at four such incidents where the Army Security Agency (ASA) monitored civilian radio transmissions. All the incidents where the ASA monitored civilian radio communications laid outside the law enforcement support.

The Church Committee then examined the military's investigation of groups it considered threats to either military personnel or installations and covered both domestic and foreign investigations that involved American citizens.²⁰⁷ The Committee concluded that no express statutory authority exists for the military to investigate persons or groups considered as threats to military personnel or facilities.²⁰⁸ The Committee recognized that DoD Directive 5200.27 exempted "threats" from its prohibition on collection against American citizens, but lamented the DoD regulation did not sufficiently define "threats."²⁰⁹ It did accept that local commanders had the authority to investigate U.S. citizens living abroad where they deemed those U.S. citizens to be a threat to their installations or personnel.²¹⁰ Since military installations inside the United States had ample access to civilian law enforcement, the military did not need to conduct investigations of persons or groups unaffiliated with the military, but needed to file appropriate complaints and follow up to ensure that law enforcement completed the investigations.²¹¹

The Church Committee noted that military intelligence was frequently asked, or independently decided, to provide information or support to civilian law enforcement.²¹²

While the Committee affirmed that the law is unclear as to the extent of the military's legal ability support to law enforcement, it did find that Posse Comitatus precluded the military from supporting law enforcement in criminal investigations of civilians.²¹³ However, the Committee stated this preclusion is in reference to active measures on the part of military intelligence, such as interviewing of witnesses and/or suspects.²¹⁴ The Church Committee acknowledged that aside from criminal investigations of civilians, the law is much more ambiguous in delimiting the types of support military intelligence may render to law enforcement.²¹⁵ Therefore, in the context of the case law cited previously, military intelligence can support domestic law enforcement in passive measures outline in the court ruling and information sharing.

The Church Committee did not address passive measures such as monitoring news media, which the U.S. Supreme Court stated was akin to what a news reporter would do. Nor did it address intelligence analysis support, except where the military participated in a Department of Justice Intelligence Evaluation Committee.²¹⁶ However, concerning this support, the Church Committee presumed that DoD would not perform this type of support if not asked.²¹⁷ In the same vein, the Church Committee also stated that DoD Directive 5200.27, while prohibiting processing (read analysis) of information on U.S. citizens or organizations not affiliated with DoD, still left enough ambiguity to perform analysis consistent with the Directive.²¹⁸

The Committee did not state either way whether providing analytical support was either authorized or illegal. By looking at the intent of the Committee hearings on military involvement, it appears the Committee would not have an issue with analytical support if: 1) the data being analyzed was not collected by active means using military

intelligence personnel (i.e. interviews, infiltration, etc.) and 2) the data analyzed did not reside in a military facility or database.

The Church Committee hearings concerning the NSA looked at their surveillance of communications involving American citizens, its reading of telegraph message traffic, and its databases containing American citizen information.²¹⁹ The Church Committee focused on NSA's reading of unencrypted international telegrams provided by the telegraph companies since World War II, codenamed SHAMROCK, after a leak in the New York Times exposed the base program.²²⁰ The NSA stated they retrieved daily telegraph traffic from New York and processed it looking for items of foreign intelligence interest, but that NSA did not have time to read telegrams of U.S. citizens.²²¹ However, the Committee noted that screening unencrypted written communications violated the National Security Council's Intelligence Directive since NSA had no warrant to look at the unencrypted telegraphs.²²² Since the operation involved communications that either originated or terminated in the United States, no civilian law enforcement authority, such as the FBI or other Department of Justice agency, conducted oversight of the program.

Another area the Church Committee looked at involved NSA's "watch lists" of words, phrases, individuals, and groups to select information that may be of intelligence value.²²³ The Committee made distinction between watch lists that specifically target U.S. citizens for foreign espionage versus watch lists that covered law enforcement crimes.²²⁴ The Committee did not raise issues as to the legitimacy of the watch lists, except where the NSA supported law enforcement without Congressional or Presidential approval. The committee desired that the lists have more stringent controls, external to

NSA, to preclude the controls changing for expediency of the mission currently at hand. The Committee reviewed NSA's files on U.S. citizens, and concluded that the files predominately existed for NSA's legitimate foreign intelligence mission.²²⁵

The Church Committee looked into the NSA's intercept of electronic communications. This focused on intercepts of telephone traffic and other signals to foreign countries. The Church Committee recognized that some intercept and dissemination of U.S. citizens' communications was unavoidable, and that NSA had internal protocols to minimize the citizen's identification both internal to and outside of NSA. The larger issue for the Committee on this area was the deliberate collection of intercept data for domestic purposes, such as identifying drug trafficking organizations or antiwar and civil rights activity and linkages, to check for "foreign influence" on those movements.²²⁶ The Committee found that NSA's domestic collection generally followed requests from other government agencies for intercepted communications information.²²⁷ In its conclusion on domestic intercept, the committee affirmed that the monitoring of domestic communications is a small part of NSA's mission, as its focus is international communications.

The Committee did not seek to stop domestic intercepts, as it acknowledged it as part of a legitimate foreign collection program, but to examine where this mission was appropriate when it involved U.S. citizens and what needed to happen to make it legal. The largest issue for the Committee was the use of intercepted communications of U.S. citizens that must follow valid legal process for law enforcement purposes, as opposed to counterespionage and counterintelligence purposes following administrative procedures with the Department of Justice and the United States Intelligence Board.²²⁸

The Foreign Intelligence Surveillance Act (FISA) of 1978 resulted from the Ervin, Church and Pike Hearings, where Congress sought to protect the privacy of U.S. persons from government surveillance of foreign communications.²²⁹ The statute limited collection of foreign intelligence without a warrant if it was reasonably expected that a U.S. person's communications would be intercepted in the process.²³⁰ The law established a special FISA court to approve electronic intercepts of national security concern if a U.S. person's communications may be intercepted without his/her prior knowledge.²³¹ The law provided that a U.S. person presumed to not be a foreign power or agent thereof.²³²

If the government reasonably expected that no U.S. person would be intercepted, the Attorney General, in consultation with the Director of National Intelligence, could authorize electronic intercepts without a warrant, provided the Attorney General informed the House and Senate Intelligence Committees.²³³ Furthermore, it allows for the testing of electronic equipment without going through the approval process with the Attorney General.²³⁴ To remedy the SHAMROCK liabilities with civilian businesses, the law afforded payment for services rendered to the government, legal protections, and penalties for violation of security protocols by the civilian businesses.²³⁵

The FISA law sought to error on the side of the U.S. person in light of the government's collection abuse by infringing on the Fourth Amendment rights. FISA effected military intelligence collection based in the U.S targeting foreign sources, and compelled DoD to work closely with the Department of Justice, the CIA, and NSA to ensure compliance.

That said, FISA hindered intelligence collection as it effectively required the government to be absolutely positive that no U.S. person was involved with the target they desired to electronically monitor. This essentially equates to beyond reasonable doubt—a conviction before trial, if the government desires not use the FISA Court, which is a cumbersome and lengthy process. The result is an effectual elevation of a “foreign power” or “agent of foreign power” to that of a U.S. person, as it is quite unlikely the government would be able to determine no U.S. person would use the target communications venue to be intercepted to forgo the FISA route.²³⁶ Also, as the 9/11 Commission report noted, the government must prove a person is either a foreign power or an agent of a foreign power in order to receive a FISA warrant.²³⁷ The 9/11 Commission also noted that FISA process is quite complex, in that the FBI and Department of Justice misinterpreted the requirements of the law on a regular basis.²³⁸ FISA restricted military intelligence from assisting law enforcement in regards to signals collection if one party is a U.S. citizen, and communications within the United States are presumed to involve a U.S. citizen. The military increased this standard to that of a U.S. person, which covers aliens legally in the United States as well as citizens of the United States. The end result of FISA is that it effectively prohibits military intelligence from supporting law domestic law enforcement using signals intelligence.

Modern Era

The War On Drugs

President Nixon declared a “war on drugs” in 1971 after calling for the creation of a national drug control strategy, due to the large increase in drug use on college campuses during the 1960s and someone in the Nixon Administration assessing a connection

between increase in drug use and increase in civil disturbances.²³⁹ However, DoD joined this war in 1981 in a limited fashion.²⁴⁰ This did not change much in status until 1989, when Congress greatly expanded the DoD's role in the War on Drugs.

The National Defense Authorization Act of 1989 brought DoD to the forefront of the War on Drugs. The statute made DoD the lead agency for detection and monitoring of aerial and maritime transit of illegal narcotics and required the Secretary of Defense to give annual written guidance on detection and monitoring of the aerial and maritime threats to national security.²⁴¹ This law required that "all command, control, communications, and technical intelligence (C3I) assets of the United States that are dedicated to the interdiction of illegal drugs be integrated by the Secretary into an effective communications network."²⁴²

Title XI recognized that DoD possesses the assets to adequately monitor the maritime and air corridors that drug traffickers use to bring their product to the United States. The relationship of the Coast Guard as a department within DoD afforded ease of coordination with the other military branches than the other federal agencies. By focusing DoD assets here, Congress fit the military capability where the likelihood of collection on U.S. persons was diminished. However, this authorization did not expressly address the FISA implications as it related to legal process on potential collection of U.S. persons. This centralized intelligence system was to transmit actionable intelligence from the military in real time so law enforcement could capitalize on the data.²⁴³ This part of the law on C3I implied that the military did not need to follow FISA to the degree NSA and CIA did. However, in the conference report to the act, Congress stated it wanted to keep the tradition of keeping the military out of direct civilian law enforcement.²⁴⁴

The law required DoD to maximize its support to law enforcement by when the services plan and conduct training and operations.²⁴⁵ The law also authorized the Secretary of Defense to lend military equipment, facilities and personnel to law enforcement, with military personnel able to operate military equipment in direct support of law enforcement and maintain equipment belonging to the military and law enforcement.²⁴⁶ Furthermore, the law allowed the military to assist LEAs in enforcing immigration and customs laws, in addition to drug laws.²⁴⁷ The law called for DoD to be reimbursed by the civilian LEA for support provided if outside of normal military training.²⁴⁸

The law attempted to maximize limited resources in that much of the interdiction support the military could provide the LEAs is compatible with its military mission. Naval ships patrol the high seas for enemy vessels in a hostile environment, so they can seek to identify potential drug transport vessels as a part of that training for their mission. Aircraft and air controllers monitor air traffic in a large area, and pursue enemy aircraft, so monitoring air corridors for planes attempting to avoid Federal Aviation monitoring and pursuing those aircraft is training for a wartime mission. Unmanned aerial vehicles and other intelligence sensors monitor movement of opposing forces through rough terrain and along avenues of approach, so monitoring border areas and drug corridors transiting them is valid training for the sensor operators.

While the law directed the Secretary of Defense to seek reimbursement, one could argue that Congress did not really expect this to happen. This is based on three things: (1) the law directed the military to maximize training and operations to assist law enforcement, meaning since the military was doing the training and/or operation to begin

with, the law enforcement support is ancillary to that training and operations. (2) With the authorization, the DoD received a sizable counterdrug budget, which would cover operations not a part of training and/or operational military missions.²⁴⁹ (3) The law required DoD to fund the National Guard counterdrug efforts after receiving an acceptable plan from the Governors on the use of the Guard. The National Guard did not seek reimbursement from law enforcement entities it supported, unless that support did not have a counterdrug nexus.²⁵⁰

The law required DoD to market its capabilities and resources available to law enforcement in each state annually.²⁵¹ In making this requirement, one can infer that Congress expected DoD to use all its available capabilities to affect the flow of drugs and drug proceeds into and out of the United States. The law also stated DoD has the ability and authority to help enforce immigration laws.²⁵² This is likely due to drug traffickers using the same corridors as illegal immigrants, and some illegal immigrants transporting drugs across the border to pay their fee to alien smugglers assisting them across the border.

Since the law included immigration, it indirectly tied immigration violations to drug trafficking. This is a pertinent argument for counterterrorism support as well, as media reports law enforcement encountering persons from terrorist havens crossing the Mexico–U.S. border illegally. An example of potential terrorists illegally crossing the U.S. border comes from a Tucson, Arizona television news report broadcast 13 August 2004. The report discussed finding Muslim accoutrements in the desert near the border and a discussion of “Special Interest Aliens,” or illegal aliens from countries considered terrorist threats.²⁵³ The report also cited a local newspaper that reported the Border Patrol

arrested fifty-three Middle Eastern men, believed to be from Iran or Syria, near Wilcox, Arizona, in June, 2004.²⁵⁴ As to the seriousness of the number of Middle Eastern persons crossing the border illegally, Border Patrol Council President T.J. Bonner states, “It is only a matter of time before another terrorist attack occurs, unfortunately.”²⁵⁵ The military intelligence community possesses assets that can assist the Border Patrol in detecting terrorists, drug traffickers, and aliens illegally crossing the U.S. border. These assets and capabilities will be covered in Chapter 5. In the context of the long war on terrorism and the connections between drug trafficking organizations and terrorist organizations, it is a logical progression to have military intelligence support domestic law enforcement in order to provide more of a defense in depth to the War on Terror. This progression will be discussed in chapter 6.

9/11 and the 9/11 Commission Report

On September 11, 2001, nineteen terrorists of Al Qaeda network hijacked four commercial U.S. jetliners, slamming two of them into the World Trade Center in New York City and one into the Pentagon in Washington, DC. Within seven weeks of this event Congress passed Public Law 107–56, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, otherwise known as the *USA PATRIOT Act*. The USA PATRIOT Act sought to streamline some of the confusion over existing laws governing surveillance. Title II, Section 203 and Title IX of the USA PATRIOT Act are the two areas of the Act that impacted military intelligence.

Title II, Section 203, changed Title 18 USC, Section 2510 by including in the definition of foreign intelligence information as “whether or not concerning a United

States person,” originally defined by the FISA Act of 1978.²⁵⁶ Whereas the FISA law excluded a U.S. person’s communications from foreign intelligence information, the USA PATRIOT Act acknowledged the possibility of a U.S. person being involved in a terrorist plot, whether wittingly or unwittingly, and sought to give that information to the appropriate agency to investigate the veracity of the U.S. person’s involvement. This indirectly applies to military intelligence, where in the past military personnel intercepted foreign communications that involved a U.S. person traditionally discontinued monitoring; now they may continue monitoring and pass the information to the FBI or other appropriate federal agency.

Title II, Section 203 also changed the Federal Rules of Criminal Procedure, governing grand juries, to allow for disclosing foreign intelligence and counter-intelligence information to “any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.”²⁵⁷ This corrected an issue the 9/11 Commission would later uncover as a factor in the terrorist attacks in 2001.²⁵⁸ This affected military intelligence personnel as they now can receive grand jury information, (actionable intelligence) to target foreign communications, whereas prior to the change they could not receive grand jury information.

Title IX of the USA PATRIOT Act made changes to the National Security Act of 1947, updating it to current technology and terrorist modus operandi. Title IX, Section 902 added terrorist activities within the scope of foreign intelligence, closing the loop on Al Qaeda’s declaration of war on the United States in 1998.²⁵⁹ In expressing its intent, Congress made clear that the information regarding terrorist activity was to be shared

with the entire intelligence community, which included the military, and that long-term relationships to share intelligence be developed throughout the intelligence community.²⁶⁰ Section 907 of Title IX establishes a virtual translation center between the CIA and FBI.²⁶¹ Military intelligence linguists possess this language skill, are already a part of the overall intelligence community, and provide a cost saving measure over hiring civilian linguists. This also affords military linguists the ability to keep their language skills current when not deployed.

The USA PATRIOT Act was an immediate reaction by Congress to the terrorist attacks, and began to ease some of the restrictions placed by the FISA law. As the fervor and shock of the attacks waned, Congress wanted a complete review of the facts surrounding the September 11 terrorist attacks. The *Intelligence Authorization Act for Fiscal Year 2003* required a “National Commission on the Terrorist Attacks Upon the United States,” otherwise known as the 9/11 Commission, be established to examine the facts leading to the attacks and recommendations for corrective measures.²⁶² Congress tasked the Commission to examine the intelligence and LEAs to see what happened and recommend improvements to prevent future attacks.²⁶³ The Commission issued its final report, *The 9/11 Commission Final Report*, on 22 July 2004.²⁶⁴ This thesis will look at the intelligence issues and recommendations identified by the 9/11 Commission as it relates to military intelligence or requirements of civilian intelligence capabilities that the military can augment.

The commission looked at the intelligence components of the various governmental agencies, including the Department of Defense, to identify shortcomings that allowed for gaps in the overall intelligence picture.²⁶⁵ A common theme in the

Commission's analysis of the various security components is that the system rewards those who protect and do not disseminate intelligence, despite that the agencies view technology as a solution and not a problem.²⁶⁶

The Committee also looked at the FISA law as it related to collection by the various intelligence agencies.²⁶⁷ The Commission found that agencies that possess the ability to intercept terrorist communications to and from the United States rarely did so, and did not seek a FISA warrant. In fact, those agencies desired to avoid all things dealing with domestic intelligence collection, and did not pass information to the agencies that had responsibility to monitor domestic terrorism.²⁶⁸ The Committee conducted the evaluation of the FISA law at least one year after the enactment of the USA PATRIOT Act, which amended sections of the FISA law to facilitate the war on terror.²⁶⁹ The Commission followed the trail of the USS Cole investigation that intertwined with some key 9/11 hijackers and noted a pattern of misunderstanding concerning the FISA requirements in the CIA and FBI.²⁷⁰ The Commission noted that this rightly frustrated agents in the field who tried to do their jobs, but ended up hamstrung by misguided rules.²⁷¹ The lack of understanding by the intelligence agencies and Department of Justice, along with not enough manpower to follow the procedures as they understood them, accounted for some of the issues surrounding the lack of FISA warrants.

The Commission examined the analytical ability of the intelligence community and found they were ill-suited for a terrorism focus.²⁷² The Commission noted that the depth of knowledge for analysis when facing one or two targets of the Cold War did not transfer to terrorism, as terrorism is more fluid, has more independent actors, and

required much quicker assessment and reaction times.²⁷³ The Commission also noted that intelligence agencies show a tendency to not question views given, including identifying and fixing vulnerabilities to dangerous threats.²⁷⁴ The military is more adept at this role as its need for actionable intelligence in counterinsurgency operations necessitates a quick analysis and dissemination of intelligence. Non-military intelligence agencies are not yet suited for the terrorism focus as they are either too young or have too many bureaucratic and political considerations to please, and so they are stifled in the manner listed by the 9/11 Commission. The military intelligence community demonstrates changing priorities of collections based on the commander's priority intelligence requirements, which can shift in the span of hours, verses days to months, and this directed through three to six or more levels of command. Military intelligence personnel also possess the requisite security clearances to work in the intelligence agencies to do the job immediately.

The Commission praised the ideas of Counterterrorism Coordinator Richard Clarke, who proposed, among other items, “undertaking a Joint Perimeter Defense program with Canada to establish cooperative intelligence and law enforcement programs, leading to joint operations based on shared visa and immigration data and joint border patrols.”²⁷⁵ The Committee noted that border officials must work closely with intelligence officials to best utilize intelligence databases in identifying suspected terrorists.²⁷⁶ Clark identified a gaping hole in U.S. border security along the northern border, which includes a large intelligence sharing and production gap. Military intelligence already possesses the assets and skill to fix this, as they work Joint and

multinational operations in the Afghanistan and Iraq theaters with their Coalition counterparts, including the Canadians.

The Commission noted the controversy over sharing intelligence with private firms and foreign governments for follow-on screening of select passengers, in relation to security and civil liberties concerns.²⁷⁷ Many seeking to protect civil liberties use a similar argument to keep the military out of the domestic intelligence business. The controversy notwithstanding, the Commission still recommended sharing the information while the government figures out the next generation of follow-on screening programs.²⁷⁸ Likewise, sharing intelligence with the military was addressed and allowed in both *Laird v. Tatum* and *United States v. Red Feather*, and authorized in the National Defense Authorization Act of 1989. The governing regulation for civilian intelligence is 28 CFR, part 23; Director Dave Barton of the Midwest High Intensity Drug Trafficking Area (HIDTA) and former chair of the HIDTA Intelligence Committee made the observations that if the military personnel follow this like the law enforcement personnel, no issues would result.²⁷⁹

The Commission noted that sharing of information among intelligence and law enforcement communities, considering the liabilities, is still beneficial.²⁸⁰ The Commission recommended that the president develop and clarify guidelines for this information exchange that protects civil liberties.²⁸¹ Executive Order 12333, which the author will cover later, appears to satisfy this recommendation.

The Commission criticized that the funding of Homeland Security dollars was not based on an assessment of vulnerabilities, but on population, and recommended that future disbursements be predicated on an assessment.²⁸² Most LEAs lack an intelligence

cell to do these assessments, while military intelligence personnel possess operational experience in this with active terrorist and insurgent organizations.

In its recommendations on how to reorganize government, the Commission made two recommendations that include military intelligence:

- Unifying strategic intelligence and operational planning against Islamist terrorists across the foreign-domestic divide with a National Counterterrorism Center;
- Unifying the many participants in the counterterrorism effort and their knowledge in a network-based information-sharing system that transcends traditional governmental boundaries;²⁸³

Here is where military intelligence can greatly benefit the counterterrorism fight. The military is already deployed and collecting intelligence on terrorist organizations in their havens—Southwest Asia, the Horn of Africa, Southeast Asia, and Latin America. This data is collected in military intelligence databases and accessible to military analysts. These same analysts have experience converting this information into actionable intelligence reports at the tactical level, as well as wider regional assessments on the movement of terrorists between the areas of operations in a Joint environment. This is what the Commission foresaw as the future, as the Commission referenced the Joint military environment as a blueprint of what the civilian interagency needs to emulate.²⁸⁴

This also ties into what the Commission regarded as a third reason for Joint Action—a lack of experts with the requisite skill level.²⁸⁵ The military intelligence community can again assist this issue as well. Since the analysts are immersed in the terrorism problem on deployments, or at agencies that directly support deployed forces, they build up these skills sought by the civilian agencies. Also, the military intelligence community has a breadth of linguists in both Active and Reserve Components that cover

the areas where terrorism has a base. The federal courts recognized and authorized this type of support in *United States v. Red Feather*, where the Court decided that the military providing what law enforcement lacks in support of their lawful duties does not violate 18 U.S.C., Section 1385.²⁸⁶ An example of this is the military intelligence brigade in Utah that capitalizes on the language skills of Mormon missionaries. This unit is authorized by to assist federal agencies in translation under the auspices of counterdrug.

The last major recommendation of the 9/11 Commission applicable to this theses is the following:

NCTC—Operations. The NCTC should perform joint planning. The plans would assign operational responsibilities to lead agencies, such as State, the CIA, the FBI, Defense and its combatant commands, Homeland Security, and other agencies. The NCTC should *not* direct the actual execution of these operations, leaving that job to the agencies. The NCTC would then track implementation; it would look across the foreign–domestic divide and across agency boundaries, updating plans to follow through on cases.²⁸⁷

The model the Commission describes is already being accomplished in the domestic counterdrug arena—the HIDTA program’s Domestic Highway Enforcement (DHE) initiative setting the precedence.²⁸⁸ The HIDTA–DHE initiative assists with highway patrol planning of coordinated enforcement operations on major interstate roadways across agency boundaries to identify and interdict illegal activity. After interdictions, the DHE program assists LEAs in evaluating the information and producing intelligence for the LEAs who conducted the interdictions. The National Guard supports this program with analysts under the direction and supervision of law enforcement.

The HIDTA program is an example of how the intelligence community as a whole can achieve a unity of effort in the NCTC as envisioned by the Commission.²⁸⁹ Following the HIDTA protocols, agencies are encouraged to share information and sign

memoranda of understanding to that effect. Military intelligence personnel under a similar arrangement can do the same for counterterrorism operations as they do for counterdrug operations. Agencies have security restrictions have protocols to vet and grant clearances for law enforcement to access and use that information, and can adapt those incorporate military personnel into their intelligence cells. Implementing a system similar to the HIDTA program and incorporating military intelligence personnel would break the intelligence community out of the Cold War paradigm, as the Commission envisioned.²⁹⁰

The last major legislation that affected intelligence is the Intelligence Reform Act of 2004. This Act came about as a result of the 9/11 Commission's Final Report, and sought to incorporate some of the Report's recommendations. This Act has some bearing on military intelligence support to law enforcement as it establishes the National Counterterrorism Center, using military Joint doctrine as an example for the intelligence centers to follow as they participate in the Counterterrorism Center. Since the DoD intelligence apparatus encompasses about eighty percent of the intelligence community budget and a majority of its structure, it stands to reason that military intelligence professionals may help staff the various nodes of the National Counterterrorism structure. This is reasonable when given a tie to international terrorism or narcotics trafficking and impact on safety of U.S. persons.

The Intelligence Reform Act of 2004 sought to tie in the military intelligence community early when it defined terrorism information to include "all information, whether collected, produced, or distributed by intelligence, law enforcement, military, homeland security, or other activities."²⁹¹ By including the military in the sources of

terrorist information, Congress implied that military intelligence, which processed and analyzed the information, should be a part of the solution. Another implication of the military intelligence community's involvement in the counterterrorism arena is under the Information Sharing Environment. This required the President to ensure that all agencies with terrorist information share that information to the maximum extent allowed by law and national security.²⁹² Since the law already defined terrorist information as including military intelligence data on terrorists, this requirement strongly inferred that those military intelligence databases are included, with military intelligence analysts to operate the interface with the interagency.

This case for military intelligence involvement is substantiated more a few sections later in the Intelligence Reform Act of 2004. In outlining the mission of the National Counterterrorism Center, Congress explicitly stated the Center is the primary analysis, integration, and strategic operational planning organization within the government concerning terrorism and counterterrorism, to include the military and intelligence arenas.²⁹³ This Center filled one key recommendation from the 9/11 Commission's Final report to facilitate information sharing.²⁹⁴ While it excluded domestic terrorism with no foreign ties, it allowed for every agency to have access to the purely domestic terrorism information, seeking to ensure that if a connection exists with a foreign terrorist organization, the linkage will be found.²⁹⁵

Concurrently with the establishment of the National Counterterrorism Center, the Intelligence Reform Act of 2004 established National Intelligence Centers to work intelligence priorities on a regional scale.²⁹⁶ Similar to the National Counterterrorism Center, the National Intelligence Centers are to share information and provide all source

analysis of foreign and domestically gathered intelligence, but the latter does not have the exclusive terrorism focus.²⁹⁷ This affords the ability to focus on other transnational crimes such as drug trafficking, human trafficking, and money laundering as well, which tie into related activities of terrorism. This arrangement is similar to the High Intensity Drug Trafficking Area's Investigative Support Center concept, were the military intelligence community in the National Guard is already performing analytical support of drug cases, as well as ancillary crimes to the drug offenses.

The Intelligence Reform Act of 2004 included the military intelligence community under section 1041, where it tasked the Director of National Intelligence to consider education grant programs within DoD.²⁹⁸ This section also required the intelligence training program to include "cross pollination," that is having an intelligence agencies' personnel spend time in other intelligence agencies.²⁹⁹ DoD policy and doctrine support this requirement. DoD Directive 5143.01 directed the Undersecretary for Defense (Intelligence) to ensure that DoD supports the National Intelligence Centers with staff.³⁰⁰ This fits with Joint Doctrine, which emphasized that "Successful interagency... coordination helps enable the (United States Government) to build international support, conserve resources, and conduct coherent operations that efficiently achieve shared goals."³⁰¹ The Intelligence Reform Act of 2004 uses almost identical language under Title VII of the statute.³⁰² The Joint publication for homeland defense advocates this as well.³⁰³

Congress weakened the separation of foreign and domestic intelligence in the Intelligence Reform Act of 2004. Congress struck "foreign" from the National Security Act of 1947, effectively changing the "National Foreign Intelligence Program as (the)

National Intelligence Program” and blurred the line between foreign and domestic intelligence that previously existed.³⁰⁴ This change fits with the previous discussion on blurring the line between foreign and domestic intelligence, and removes a barrier that kept some foreign terrorist information from getting to domestic agencies prior to 9/11.³⁰⁵

The 9/11 Commission identified intelligence shortfalls that allowed the 9/11 events to take place, and gave recommendations that helped to remedy those deficiencies. Congress implemented most of the recommendations. The impact on military intelligence is that as the military is a major player in intelligence, it needs to be an active player in the homeland defense role. This includes using military capabilities to augment and support the interagency abilities to protect the homeland, working in support of those agencies. This ranges from providing sensor support to having analysts detailed to these agencies to help them build their own capacity. When tying the Commission’s recommendations in a historical context of military intelligence support to domestic law enforcement, this support should be long term, as the statutory and case law analysis support long term relationships concerning military support to and liaison with the interagency.

Executive Orders and DoD Directives

Prior to the Rockefeller Commission report mentioned earlier in this chapter, DoD sought to bring order to its intelligence program. It began with the counterintelligence mission in February, 1971, where DoD issued Directive 5200.26 to establish oversight at the undersecretary level for counterintelligence investigations.³⁰⁶ This Directive sought to correct the military counterintelligence investigating non-DoD employees, as the practice precipitated Congressional hearings on the matter.

Once President Ford received the Rockefeller Commission Report on activities of the CIA and the intelligence community within the United States, the President sought to correct violations and bring regulatory guidance through Executive Order 11905.³⁰⁷ This Executive Order authorized the CIA “to collect and produce intelligence on foreign elements of international terrorism and narcotics trafficking.”³⁰⁸ Today the CIA still assists in these functions with federal law enforcement and other intelligence community entities.

Furthermore, Executive Order 11905 allowed for DoD to share critical intelligence within the U.S. Government intelligence community, such as narcotics, terrorism, and foreign intelligence.³⁰⁹ DoD Directive 5200.27 allowed the military to assist with the Department of Homeland Security in doing analysis of critical infrastructure as part of intelligence preparation of the environment.³¹⁰ One of the purposes of intelligence is to assist the commander to best utilize his limited resources to accomplish the mission. This is accomplished through the intelligence preparation of the environment process, which military intelligence is adept at with over seven years of recent counterinsurgency experience.

Executive Order 11905 defined a foreign intelligence agency in part as “any other department or agency of the United States Government . . . while it is engaged in the collection of foreign intelligence or counterintelligence.”³¹¹ This definition tied the restrictions of the Executive Order to the military intelligence community. The Executive Order barred the intelligence community from direct physical surveillance against a U.S. person, barred electronic surveillance within the United States other than for equipment testing, and curtailed examination of mail envelopes outside of applicable statutes.³¹² The

executive order limited military intelligence support to passive support of law enforcement, in compliance with the *United States v. Red Feather* federal court decision. Activities such as photo reconnaissance, intelligence training, equipment support, and analysis are examples of what the executive order allowed as they are expressly authorized by either statutory or case law.³¹³ The executive order did not prohibit surveillance of a geographic area, which laid the foundation for the area surveillance mission incorporated into the overall counterdrug mission.

Executive Order 11905 did lay the foundation for interagency “cross pollination,” or exchange of personnel between agencies. It affected military intelligence personnel in that when a service member worked for a federal agency outside DoD, such as the FBI, the service member was prohibited from disclosing that agency’s affairs to DoD, except as authorized by the host agency. This in effect allowed for military intelligence support to law enforcement, as the National Guard counterdrug program practices this concept today.

The current executive order in effect governing intelligence activities is Executive Order 12333, originally designed under President Reagan. The current order is essentially similar to the original, updated for new technological capabilities, the global war on terrorism, and new intelligence activities within the federal government. The order focused the intelligence community on identifying threats from espionage, terrorism, and weapons of mass destruction.³¹⁴ However, the order did direct the intelligence community to consider state, local and tribal concerns in regards to intelligence collection and dissemination, and to “prepare and provide intelligence . . . that allows free exchange

of information.”³¹⁵ Consistent with its guidance regarding consideration of the law enforcement community, the order delineated five areas that pertain to this thesis.

1. “Information that is publically available,” otherwise known as open source information. As previously mentioned in discussion of the Intelligence Reform Act of 2004, the law codified the intelligence community’s responsibility to perform this analysis.³¹⁶ In this point the executive order sought to modernize guidance to the information age, and recognized that publicly available information is the least intrusive means of gathering information on a target of investigation. This guidance is consistent with the U.S. Supreme Court’s ruling in *Laird v. Tatum*.³¹⁷ As most terrorist groups post what they espouse, general targeting information, and pictures of terrorist activity on the Internet, as well as drug traffickers posting their information on MySpace or Facebook, it stands to reason that intelligence should conduct open source research to find this useful information to dismantle both terrorist and drug trafficking cells and organizations. Military intelligence is quite experienced at open source analysis as military intelligence conducts this mission regularly in deployed theaters of operation. The tasks mentioned here are consistent with DoD Directive 5525.5, where it directs DoD to consider law enforcement needs when planning and conducting training.³¹⁸ This also has the additional benefit of maintaining skills in garrison that military intelligence personnel use while deployed to seek public information on their operational area if the military intelligence personnel operate under the auspices and at the direction of the supported law enforcement agency.

2. “Information obtained in the course of a lawful foreign intelligence, counter-intelligence, international narcotics or international terrorism investigation.”³¹⁹ As

mentioned in Chapter 1, The Department of State lists eighteen terrorist organizations that derive a substantial amount of their support from drug trafficking.³²⁰ Consistent with DoD Directive 5240.1, where terrorist activities are explicitly mentioned, narcotics trafficking should be covered as well.³²¹ In addition, this instruction also nests with DoD Directive 5525.5.³²² When looking at this as authorized by the Posse Comitatus Act, and the link between narcotics and terrorism as noted above, Congress authorized this support in the Defense Authorization Act of 1989, in requiring DoD to support drug interdiction efforts.³²³ Executive Order 12333 allowed the intelligence community to participate in law enforcement investigations of international terrorists and narcotics activities.³²⁴

3. “Information needed to protect the safety of any persons or organizations, including those who are targets, victims or hostages of international terrorist organizations.”³²⁵ DoD Directive 5240.1 stated that military intelligence can collect information on international terrorist activities, and use the least intrusive means feasible when dealing with a U.S. person.³²⁶ DoD Directive 5143.01 defined national intelligence as “all intelligence, regardless of the source from which derived and including information gathered within or outside the United States that pertains, as determined consistent with any guidance issued by the President, to more than one United States Government Agency; and that involves threats to the United States, its people, property, or interests; the development, proliferation, or use of weapons of mass destruction; or any other matter bearing on United States national or homeland security.”³²⁷ This stated it is lawful for military intelligence to support counterdrug operations and counterterrorism efforts within the United States via developing and executing collection plans approved by law enforcement, and analysis and report generation for law enforcement use.

4. “Information acquired by overhead reconnaissance not directed at specific United States persons.”³²⁸ Unmanned aerial vehicles (UAV) possess the capability to observe large tracts of land, to include monitoring border areas for alien and drug smuggling activity consistent with the Intelligence Reform Act of 2004.³²⁹ In accordance with the Economy Act of 1932, the cost of a UAV is much cheaper than other platforms capable of this mission, such as manned aircraft, and law enforcement is allowed to ask for its use in that Act.³³⁰ The Federal Court for the District of South Dakota stated that the Economy Act of 1932 served as a logical basis for military support to law enforcement for systems the military readily has available in *United States v. Red Feather*.³³¹

Using UAVs to support law enforcement as mentioned above is consistent with DoD Directive 5525.5 as well, and provides realistic training for UAV crews as well³³². Dr. Steven Bucci, speaking to the Intermediate Level Education class at Fort Leavenworth, Kansas, explained how UAVs supported the metropolitan Washington, DC police in the beltway sniper attacks of 2002.³³³

5. “Incidentally obtained information that may indicate involvement in activities that may violate federal, state, local or foreign laws.”³³⁴ This instruction in the order is consistent with 10 U.S. Code, section 371, for both drug interdiction and terrorism.³³⁵ Alert military intelligence personnel may pick up indicators of criminal activity in the course of their duties. Even in conducting open source searches for information, it is relatively easy to stumble on evidence of obvious criminal activity. The law afforded military personnel the opportunity to give that information to law enforcement without recrimination for otherwise violating law, executive orders, or regulations.

Another area Executive Order 12333 allowed for is concealed monitoring device support to law enforcement. Military intelligence monitoring devices that are not prohibited include ground surveillance radars (GSR), Remotely Monitored Battlefield Sensor System (REMBASS), and signals direction finding systems.³³⁶ DoD Regulation 5240.1-R may be incongruous with Executive Order 12333, in that it appears to not allow remote sensor monitoring along the U.S. border when the sensors are in the United States. The Regulation defined concealed monitoring as:

targeting by electronic, optical, or mechanical devices a particular person or a group of persons without their consent in a surreptitious and continuous manner. Monitoring is surreptitious when it is targeted in a manner designed to keep the subject of the monitoring unaware of it. Monitoring is continuous if it is conducted without interruption for a substantial period of time.³³⁷

However, the context of the regulation is to prevent collection targeting U.S. persons or that information which identifies U.S. persons, except where authorized. The sensors listed above cannot identify a U.S. person by identifying characteristics. The GSR can tell if the return is a vehicle or dismounted person, direction and range from the radar. The REMBASS can tell the same if it breaks the string of employed sensors, within a certain range. To direction find a signal, a collector system will only give a “cut,” that is a general azimuth to the signal origination. To determine location, three different collectors need to identify the same signal, and the intersecting azimuths give the general location. The collector can be used to monitor frequency only, instead of audio. Therefore, these sensors (and similar other sensors) harmonize with the executive order, which is updated to reflect current technology.

DoD Directive 5525.5 went into more detail on authorization by law. It cited several laws the directive can support, as well as allowing for support to other laws

Congress may pass.³³⁸ The Defense Authorization Act of 1989 satisfied this section for military support to the War on Drugs.³³⁹ The Intelligence Reform Act of 2004 also satisfied this section in the War on Terror.³⁴⁰ However, the directive limited the support to temporary support for training or operational support, and limited regular involvement in essentially civilian law enforcement operations.³⁴¹ These limitations are in conflict with the Intelligence Reform Act of 2004, the National Defense Authorization Act of 1989, and Executive Order 12333, in that these documents envision long term interagency cooperation in terrorism and narcotics trafficking.

These executive orders and directives give broad guidance to the intelligence agencies of the United States government are the first step in regulating DoD intelligence component activities. The next level is how this broad guidance translated into specific limits and doctrine for military intelligence components, and the effect on support to counterdrug and counterterrorism.

Regulations and Doctrine

Regulations implement the directives at the DoD and service level, and serve as the limits to what military operations can conduct. Doctrine is the principle or reasoning that guides the “how” in the way the military conducts operations. DoD Regulation 5240.1-R, National Guard Regulation (NGR) 500-2, and Army Regulation (AR) 381-10 govern the limits of military intelligence support in domestic operations. However, only AR 381-10 and NGR 500-2 remained somewhat current with changes in statutory and case law. AR 381-10 restated what is in DoD Regulation 5240.1-R and added extra instructions for specific Army intelligence missions. Only those extra instructions as they pertain to this thesis are discussed by exception. Joint Publication (JP) 3-07.4 (Joint

Counterdrug Operations) and JP 3-27 (Joint Homeland Defense) are the two doctrinal publications that guide military intelligence support to counterdrug or counterterrorism operations.

DoD Regulation 5240.1-R implemented how DoD expected to comply with the National Security Act of 1947, The Foreign Intelligence Surveillance Act of 1978, DoD Directive 5525.5, and E.O. 12333 governing how DoD intelligence components' activities affect U.S. Persons.³⁴² DoD 5240.1-R governed independent collection by DoD intelligence components and granted limited authority to perform collection for foreign intelligence and counterintelligence purposes. DoD made no updates to this regulation since 1982, even though Congress passed numerous laws affecting intelligence activities, such as the National Defense Authorization Act of 1989, The USA PATRIOT Act, and The Intelligence Reform Act of 2004, as well as the President's periodic updates to E.O. 12333.

DoD Regulation 5240.1-R encompassed fifteen procedures that govern intelligence activities and served as a basis for AR 381-10 and NGR 500-2, covering military personnel under both Title 10 and Title 32 USC status. The regulation granted limited authority to collect, retain, and disseminate information regarding U.S. persons in Procedures Two through Four.³⁴³ While Procedures Five through Ten govern collection techniques concerning foreign intelligence targets, they have application in the domestic arena concerning counterdrug and counterterrorism.³⁴⁴

Procedure Two of DoD Regulation 5240.1-R covered the collection of information regarding U.S. persons, but did not state whether this collection is independent by the military or in support of a civilian LEA. This procedure is generally

understood to cover authorized domestic intelligence collection missions. In the historical context when this regulation was written in the late 1970s, it sought to address the concern of the American public in regards to how military intelligence units independently collected information on U.S. persons. Not only was the collection a concern, but that military intelligence units stored them in military databases without any supporting requests from law enforcement to do so. This procedure allowed DoD intelligence components to collect information by all lawful means, utilizing the least intrusive means possible, including open-source material, and in accordance with E.O. 12333.³⁴⁵ NGR 500-2, written to govern the counterdrug program of the Army and Air National Guard, placed the responsibility for obtaining necessary warrants, subpoenas, and collection requirements on the supported LEA.³⁴⁶ In regards to military support to law enforcement for counterdrug and counterterrorism, this guidance is prudent.

Among other items, Procedure Two in DoD Regulation 5240.1-R allowed DoD intelligence personnel to collect information on U.S. persons engaged in international narcotics and international terrorism.³⁴⁷ DoD intelligence personnel may utilize overhead imagery, and search publically available information regarding U.S. persons engaged in narcotics and terrorism, using the least intrusive means.³⁴⁸ This is consistent with the federal court rulings in *Laird v. Tatum* and *United States v. Red Feather*, which stated passive support to law enforcement by the military is legally acceptable.³⁴⁹ Note that this regulation came about well before the Internet revolution, which greatly expanded the availability of information regarding a U.S. person in the public domain. The Intelligence Reform Act of 2004 explicitly stated that the intelligence community should exploit Open Source Intelligence, which encompasses the Internet, to gather intelligence on terrorist

and narcotics activities.³⁵⁰ An example of how this works in the counterdrug arena is a law enforcement officer directs a counterdrug analyst working at the police station to search the Internet for any information on suspect John Doe. The analyst finds John Doe's FaceBook page as an open source material and captures pictures of John Doe holding guns next to his marijuana plants, in compliance with DoD Regulation 4240.1-R.³⁵¹ In addition, Joint Publication 3-07.4, Joint Counterdrug Operations, listed linguist and intelligence services as valid missions for counterdrug support to law enforcement, something the military can do in the course of training under the Economy Act.³⁵² DoD Regulation 5240.1-R did not address information residing in law enforcement databases that a military intelligence professional supporting a LEA would have access to.

DoD Regulation 5240.1-R Procedure Three governed the retention of information about U.S. persons, again in the historical context of post-Church and Pike Committee hearings. This procedure allowed information collected pursuant to Procedure Two to be retained in DoD intelligence systems for ninety days, with the availability of a ninety day extension, to determine if the information can be permanently retained for intelligence use.³⁵³ AR 381-10 required information deemed legal to retain be reviewed annually to verify the purpose for retaining the information is still valid.³⁵⁴ AR 381-10 addressed information collected pursuant to a law enforcement approved collection plan in support of a law enforcement counterdrug or counterterrorism mission under its reworked Procedure 12 when it stated:

Intelligence personnel assigned or detailed to counter drug elements supporting CLEA must comply with the rules governing that agency and the rules under which the Army approved their assignment or detail.³⁵⁵

NGR 500-2 framed the issue as:

National Guard members support the criminal (narcotics) information analysis activities of LEAs, Criminal (narcotics) information comes into temporary possession of National Guard members supporting LEAs, but is not retained by the National Guard.³⁵⁶

NGR 500-2 also stated that “The National Guard will not maintain or store final products in National Guard facilities or databases.”³⁵⁷ This regulation did not restrict use of National Guard equipment to create the products, especially when the equipment was housed at the supported LEA. Common sense dictates that equipment, such as a stand-alone computer not remotely connected into the DoD network, housed at an LEA is under the LEA’s control. This logic affords to the use of military intelligence software programs to identify complex patterns.

Procedure Four in DoD Regulation 5240.1-R provided dissemination guidelines for information collected under Procedure Two and retained under Procedure Three, not administrative in nature, court ordered, or otherwise governed by law.³⁵⁸ The regulation allowed for dissemination to law enforcement and other members of the intelligence community, provided they had a need for the information in the course of their official duties.³⁵⁹ In practice, the Provost Marshall is the deciding authority and conduit to LEAs for most military installations. NGR 500-2 stated that the LEA is responsible for setting dissemination rules, to include public affairs and press releases, and serves as a guideline for DoD policy clarification where needed on the subject.³⁶⁰

DoD Regulation 5240.1-R Procedure Five governed electronic surveillance within the United States for intelligence purposes.³⁶¹ The purpose of electronic surveillance is to collect information on non-U.S. persons operating for or on behalf of a foreign power for foreign intelligence purposes, as covered by AR 381-10.³⁶² While the 1984 version of AR 381-10 stated if electronic surveillance is conducted against foreign targets where both

sender and receiver are outside the United States, the electronic surveillance platform can be within the United States, the 2007 version did not specifically address this.³⁶³

Collection of this nature is valuable in monitoring border areas for drug and alien smuggling across the border or territorial waterways. This foreign focus of surveillance meets the intent of the Intelligence Reform and Surveillance Act by supporting monitoring of the border for smuggling operations.³⁶⁴ If in the course of this foreign electronic surveillance collection, the collection system “incidentally” acquires the communications of a U.S. person, the surveillance status does not automatically change to “directed” against a U.S. person.³⁶⁵ Since Procedure Six defined communications concerning a U.S. person as that which gives uniquely identifiable information on a person such as name, address, or personal identifiers, this severely limits electronic surveillance within the United States.³⁶⁶

Procedure Six of DoD Regulation 5240.1-R covered concealed monitoring and encompasses electronic, optical, or mechanical devices in a continuous a manner.³⁶⁷ This is done along the borders to identify when traffickers are crossing the border, but does not detect where they go after entry into the United States. This involves use of unmanned aerial vehicles (UAV) and remotely monitored ground sensors. No reasonable expectation of privacy exists, which is where a reasonable person is entitled to believe his or her actions are not subject to monitoring by electronic, optical or mechanical devices.³⁶⁸ Since the border is generally considered open fields, a person has no reasonable expectation of privacy. This lack of reasonable expectation of privacy is confirmed by the U.S. Supreme Court decision in *Oliver v. United States* as follows:

Since *Katz v. United States*, *supra*, the touchstone of Fourth Amendment analysis has been whether a person has a "constitutionally protected reasonable expectation of privacy." *Id.* at 389 U. S. 360. The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as reasonable." *Id.* at 389 U. S. 361. *Because open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy in open fields is not one that society recognizes as reasonable. Moreover, the common law, by implying that only the land immediately surrounding and associated with the home warrants the Fourth Amendment protections that attach to the home, conversely implies that no expectation of privacy legitimately attaches to open fields.* Pp. 466 U. S. 177–181.³⁶⁹

This court case came after DoD Regulation 5240.1-R was written, and DoD did not update the regulation to account for changes in statutory and case law. NGR 500-2 contained language that addressed area surveillance verses person surveillance and required a law enforcement officer to be present or in direct contact with the military unit performing a reconnaissance mission.³⁷⁰ This procedure ties directly with and impacts Procedure Nine.

DoD Regulation 5240.1-R Procedure Nine covered physical surveillance of a person for foreign intelligence purposes, but did not cover area surveillance.³⁷¹ Again, NGR 500-2 provided good verbiage that met the intent for interagency cooperation monitoring per the Intelligence Reform and Surveillance Act of 2004.³⁷² NGR 500-2 allowed for area surveillance to detect and record activity occurring within the designated area pertaining to trafficking and drug related activities utilizing unattended sensors, listening posts/observation posts, and ground surveillance radar.³⁷³ Joint Publication 3-07.4 listed aerial and ground reconnaissance as valid missions for counterdrug support to law enforcement.³⁷⁴ The aerial reconnaissance mission in NGR 500-2 allowed for following aircraft, watercraft and motor vehicles using UAVs, radars, and manned

aircraft, provided a law enforcement officer is either onboard the aircraft, or in direct contact.³⁷⁵ To apply this to UAV reconnaissance, the law enforcement officer should be by the command module. This is what DoD did in a Title 10 status to support law enforcement in the metropolitan Washington, DC, sniper terrorism case in 2002, according to Dr. Steven Bucci.³⁷⁶ As AR 381-10 contained the caveat that Army intelligence components may assist the FBI in conducting physical surveillance if requested by the FBI, in accordance with the Delimitations Agreement, this action fit within the regulatory guidance.³⁷⁷ AR 381-10 authorized surveillance of non-U.S. persons who enter the United States if approved by the Commanding general, Intelligence and Security Command, or Army Chief of Staff for Intelligence, or their designees.³⁷⁸ This interpretation is in light of the alien status listed in DoD Regulation 5240.1-R under Procedure 5.3.2.4.2.³⁷⁹

The last procedure that affects military intelligence support to law enforcement for counterdrug and counter terrorism is Procedure Twelve in DoD Regulation 5240.1-R, covering law enforcement assistance by DoD intelligence components.³⁸⁰ The context of this procedure entailed the DoD intelligence community providing criminal information to law enforcement if encountered in the course of the DoD intelligence community's authorized missions, independent of law enforcement involvement.³⁸¹ This procedure allowed for cooperating with investigations for international narcotics and terrorist activities, and authorized DoD intelligence component personnel to be assigned to federal law enforcement agencies.³⁸² DoD Regulation 5240.1-R also allowed for the option of analyst support in this procedure by assigning DoD intelligence personnel to a federal law enforcement agency, which is central to assisting the federal interagency in building

intelligence analytical capacity, as called for in the Intelligence Reform and Surveillance Act of 2004.³⁸³

DoD regulations governing intelligence activities have not kept up to date with Executive Order changes, new or revised statutory laws or court decisions affecting intelligence activities. The framework in these regulations allow for some support, but appear to be more of a crutch DoD can cite as to why they should not support the law enforcement community in the United States in the war on terrorism or the war on drugs. However, this paradigm is showing signs of shifting as Joint doctrine expanded the guidelines to support the interagency, to include domestic law enforcement.

Joint Publication (JP) 3-07.4, Joint Counterdrug Operations, gave the doctrinal framework for counterdrug operation within the United States. The Joint Publication states:

DOD policy guidance recognizes that “illicit drugs traffickers and terrorists often use the same methods to smuggle money, people, information, weapons and substances, and that in many cases, illicit drug traffickers and terrorists are one and the same.” Looking beyond terrorism, the illegal drug industry can fuel violence and corruption to levels which may overwhelm governments, threatening the stability of key countries or creating “ungoverned spaces.”³⁸⁴

This demonstrates a paradigm shift within the Pentagon, where senior leadership officials, including former Secretary of Defense Donald Rumsfeld, considered the military counterdrug mission as “nonsense” and departed from earlier assessments concerning drug trafficking.³⁸⁵ National Security Decision Directive 221, signed by President Reagan, considered the drug trade a national security threat, both for its effects domestically and due to some drug traffickers cooperating closely with insurgents and terrorist organizations.³⁸⁶ The National Security Decision Directive acknowledged the latter two derived a major portion of their support from narcotics trafficking.³⁸⁷ JP 3-07.4

reaffirmed that terrorists use drug venues to conduct terrorism not related to drug trafficking, coining the term “narco-terrorist.”³⁸⁸

To facilitate the interagency integration required by the Intelligence Reform Act of 2004, JP 3-07.4 recognized the FBI and DEA as the two lead agencies within the Department of Justice for terrorism and narcotics investigations.³⁸⁹ JP 3-07.4 also acknowledged the National Drug Intelligence Center as the principal center for strategic intelligence on drug activity, which infers a support role to this center based on requirements from the Intelligence Reform and Surveillance Act of 2004.³⁹⁰ The National Guard Counterdrug program embodies the Joint Publication in that it is the largest Joint counterdrug program within the United States and includes large numbers of both Army and Air National Guardsmen. The missions listed in JP 3-07.4, taken from NGR 500-2, exemplify the types of support that law enforcement is looking for from the military, as this paper will cover in Chapter 5.

JP 3-27, Homeland Defense, provided the doctrinal framework to protect the U.S. homeland, which is DoD’s highest priority, and focused on terrorism.³⁹¹ While DoD is responsible for the homeland defense mission, it may be in a support role to the Department of Homeland Security or other Federal agency, and DoD will coordinate closely with the other federal agencies involved.³⁹² JP 3-27 identified civil support as part of the DoD’s mission to secure the homeland.

Military intelligence support nests within interagency support in respect to Title 50 U.S. Code, Section 402, which included transnational threats of narcotics, alien smuggling, and terrorism as threats to United States national security.³⁹³ JP 3-27 stated that illegal immigrants, drugs, and terrorists remain persistent threats to the United

States.³⁹⁴ Also, JP 3-27 quoted the Strategy for Homeland Defense and Civil Support where it “calls for securing the United States . . . through an active, layered defense in depth.”³⁹⁵ However, while JP 3-27 discussed a proactive approach by DoD outside the United States, it placed DoD in a reactive mode within the United States. Dave Barton, Director of the Midwest High Intensity Drug Trafficking Area, stated wryly, “We cannot keep drugs out of the Fort Leavenworth Federal Prison. Why do we think we can stop smuggling at the border? We need to have a defense in depth within the United States.”³⁹⁶

JP 3-27 stated “homeland defense operations may be either active or passive.”³⁹⁷ Most military intelligence operations other than Human Intelligence collection and Communications intercept meet the legal definition of passive support, per the court ruling in *United States v. Red Feather*.³⁹⁸ JP 3-27 affirmed that passive military intelligence support to law enforcement in support of counterdrug and counter-terrorism operations is within Joint doctrine parameters.³⁹⁹ It acknowledged DoD’s ability to conduct intelligence support operations inside the United States within specific guidelines, but did not place much emphasis on this domestic intelligence support.⁴⁰⁰ However, while JP 3-27 called for training, intelligence preparation of the environment, and intelligence, surveillance, and reconnaissance to be conducted to facilitate planning, it only called for DoD to do this outside the United States, except for North American Aerospace Defense Command’s tactical warning and attack assessments.⁴⁰¹ This apparent contradiction provides a glimpse into the DoD struggle to not cross any lines concerning collecting on U.S. persons.

Four of the offensive objectives JP 3-27 called for have direct bearing on both offensive and defensive operations to protect the homeland within the United States. The objectives listed in JP 3-27 are (number Four omitted as it did not apply to the topic):

- (1) Disrupt enemy coherence and dissipate his power.
- (2) Secure or seize important terrain
- (3) Deny the enemy resources for continued hostile operations (read narcotics trafficking operations).
- (5) Gain information to support continuing operations against enemy forces (read intelligence analysis and dissemination)⁴⁰²

Although JP 3-27 did not state so, these objectives apply to both offensive and defensive actions.

JP 3-27 called for Combatant Commanders with homeland defense responsibilities having the lead for DoD homeland defense intelligence operations.⁴⁰³ Military intelligence regularly develops and synchronizes the collection effort to maximize limited resources and support situational awareness, which is a capability that law enforcement needs, but presently lacks. JP 3-27 called for DoD to lead the way in information sharing and listed it as an “operational necessity . . . that minimizes intelligence gaps.”⁴⁰⁴

Military intelligence can support law enforcement with passive measures in counterdrug and counter terrorists operations, as shown by both statutory and case law. Modern era executive orders written since 1980 give clarification to the laws passed governing DoD intelligence activities. However DoD Directives do not address changes in the statute or court rulings since 1984. The Joint publications give the doctrinal framework of how to support domestic counterdrug and counterterrorism operations. The regulations give specific guidance on implementing intelligence support.

Conclusion

The legal review of historical events and the legislation regarding military employments around them clearly show statutory and case law exists allowing military intelligence components to support law enforcement in counterdrug and counterterrorism. The constitutional debate and legislation shortly after the conclusion of the war for independence gave the president latitude in using force to put down insurrections. The analysis of the Whiskey Rebellion and Tax Rebellion of 1799 shows that Congress and the founding fathers of the Constitution recognized the need for the nation to enforce its laws against rebellion and insurrection. The review of the use of military forces framing the Civil War and Reconstruction era that led into passage of the Posse Comitatus Act show that the military's mission evolved into a direct law enforcement mission absent a directive by the President, although Congress did authorize this mission creep.

Military intelligence activities, once Congress began granting exceptions to the Posse Comitatus Act, expanded until Congress defined what military intelligence activities were acceptable within the United States. However, Congress then began to loosen these restrictions in the War on Drugs and as a result of the terrorist attacks on 11 September 2001, with the latter based on the Congressional Commission's recommendations, the Commission being set up after the attacks.

The research showed that presidential executive orders, DoD directives, and regulations are more restrictive than what either statutory or case law entail, and are the major limiters to the amount of support military intelligence can provide to law enforcement. Doctrine, on the other hand, allows for an expanded mission once the regulations, which DoD and the Army did not update over the last twenty-five years, are

updated. Now that the legal justification is established, chapter 5 will cover what the military intelligence community has to support law enforcement in counterdrug and counterterrorism operations, and areas law enforcement desires assistance from the military intelligence community.

¹Richard H. Kohn, "The Washington Administration's Decision to Crush the Whisky Rebellion," *The Journal of American History*, 59, no. 3 (December 1972): 567, <http://www.jstor.org/stable/1900658> (accessed 2 April 2009).

²Matt Matthews, "The Posse Comitatus Act and the United States Army: A Historical Perspective" (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 6.

³Alexander Hamilton, "Federalist no. 29," Constitution.org <http://www.constitution.org/fed/federa29.htm> (accessed 1 January 2009).

⁴Ibid.

⁵*The Judiciary Act of 1789*, 1 Stat. 73. CHAP. XX, SEC 27 (24 September 1789). http://www.constitution.org/uslaw/judiciary_1789.htm (accessed 23 September 2008).

⁶*The Military Act of 1792*, Statute at Large, Vol. I, CHAP. XXVIII (2 May 1792), § 1-2.

⁷Matt Matthews, "The Posse Comitatus Act and the United States Army: A Historical Perspective" (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 8.

⁸William D. Barber, "Among the Most Techy Articles of Civil Police: Federal Taxation and the Adoption of the Whiskey Excise," *The William and Mary Quarterly*, Third Series, 25, no. 1 (January 1968), 58-84, <http://www.jstor.org/stable/1920806> (accessed 3 April 2009).

⁹Ibid., 58.

¹⁰Ibid., 60.

¹¹Max Ferrand, "The Records of the Federal Convention of 1787" (New Haven, CT, 1911), 204. Quoted in William D. Barber, "Among the Most Techy Articles of Civil Police: Federal Taxation and the Adoption of the Whiskey Excise," *The William and Mary Quarterly*, Third Series, Vol. 25, no. 1 (January 1968), 60. <http://www.jstor.org/stable/1920806> (accessed 3 April 2009).

¹²Jonathan Elliott, "The Debates of the Several Conventions on the Adoption of the Federal Constitution" (Washington, DC, 1836), IV, 75. Quoted in William D. Barber,

“Among the Most Techy Articles of Civil Police: Federal Taxation and t Adoption of the Whiskey Excise,” *The William and Mary Quarterly*, Third Series, Vol. 25, no. 1 (January 1968), 60. <http://www.jstor.org/stable/1920806> (accessed 3 April 2009).

¹³William D. Barber, “Among the Most Techy Articles of Civil Police: Federal Taxation and t Adoption of the Whiskey Excise,” *The William and Mary Quarterly*, Third Series, 25, no. 1 (January 1968), 68-69. <http://www.jstor.org/stable/1920806> (accessed 3 April 2009).

¹⁴*Ibid.*, 71-73.

¹⁵*Ibid.*, 80.

¹⁶Encyclopedia Britannica, *Whiskey Rebellion*, Encyclopedia, 2005. <http://www.britannica.com/EBchecked/topic/641925/Whiskey-Rebellion> (accessed 2 January 2009).

¹⁷Richard H. Kohn, “The Washington Administration’s Decision to Crush the Whisky Rebellion,” *The Journal of American History*, 59, No. 3 (December 1972), 568. <http://www.jstor.org/stable/1900658> (accessed 2 April 2009).

¹⁸The Columbia Encyclopedia, *Whiskey Rebellion*, Encyclopedia, 6th ed., 2008. <http://www.encyclopedia.com/doc/1E1-WhiskReb.html> (accessed 2 January 2009).

¹⁹Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 19.

²⁰Richard H. Kohn, “The Washington Administration’s Decision to Crush the Whisky Rebellion,” *The Journal of American History*, 59, no. 3 (December 1972), 570. <http://www.jstor.org/stable/1900658> (accessed 2 April 2009).

²¹*Ibid.*, 583.

²²*Ibid.*, 571.

²³*Ibid.*, 580.

²⁴Encyclopedia Britannica, *Whiskey Rebellion*, Encyclopedia, 2005. <http://www.britannica.com/EBchecked/topic/641925/Whiskey-Rebellion> (accessed 2 January 2009).

²⁵Richard H. Kohn, “The Washington Administration’s Decision to Crush the Whisky Rebellion,” *The Journal of American History*, 59, no. 3 (December 1972), 583. <http://www.jstor.org/stable/1900658> (accessed 2 April 2009).

²⁶*Ibid.*, 573.

²⁷Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 58-59.

²⁸Matt Matthews, "The Posse Comitatus Act and the United States Army: A Historical Perspective" (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 11. See also Harold C. Syrett, ed., *The Papers of Alexander Hamilton, Volume 17, August 1794–December 1794* (New York: Columbia University Press, 1972), 331–336.

²⁹*The Judiciary Act of 1789*, 1 Stat. 73. CHAP. XX, SEC 28 (24 September 1789). http://www.constitution.org/uslaw/judiciary_1789.htm (accessed 23 September 2008); The exception to this is when the duly appointed law enforcement official either cannot or will not conduct his sworn duty.

³⁰*The Military Act of 1792*, Statute at Large, Vol. I, CHAP. XXVIII (2 May 1792), n2; See also Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective* (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 13; Stated "On 28 February 1795, Congress revamped the Calling Forth Act of 1792. Delighted by Washington's performance during the Whiskey Rebellion, Congress increased the president's power. The president no longer had to rely on a judge before calling out the militia. More importantly, he could call forth citizen soldiers to put down insurrections and uphold the laws even when Congress was in session."

³¹*The Military Act of 1792*, Statute at Large, Vol. I, CHAP. XXVIII (2 May 1792), n2; **Sec. 5.** *And be it further enacted*, That every officer, non-commissioned officer or private of the militia, who shall fail to obey the orders of the President of the United States in any of the cases before recited, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial; and such officers shall, moreover, be liable to be cashiered by sentence of a court martial: and such non-commissioned officers and privates shall be liable to be imprisoned by the like sentence, or failure of payment of the fines adjudged against them, for the space of one calendar month for every five dollars of such fine. **Sec. 6.** *And be it further enacted*, That court martial for the trial of militia be composed of militia officers only. **Sec. 7.** *And be it further enacted*, That all fines to be assessed, as aforesaid, shall be certified by the presiding officer of the court martial before whom the same shall be assessed, to the marshal of the district, in which the delinquent shall reside, or to one of his deputies; and also the supervisor of the revenue of the same district, who shall record the said certificate in a book to be kept for that purpose. The said marshal or his deputy shall forthwith proceed to levy the said fines with costs, by distress and sale of the goods and chattels of the delinquent, which costs and manner of proceeding, with respect to the sale of the goods distrained, shall be agreeable to the laws of the state, in which the same shall be, in other cases of distress; and where any non-commissioned officer or private shall be adjudged to suffer imprisonment, there being no goods or chattels to be found, whereof to levy the said fines, the marshal of the district or his deputy may commit such delinquent to gaol, during the term, for which he shall be so adjudged to imprisonment, or until the fine shall be paid, in the same manner as other persons condemned to fine and imprisonment at the suit of the United States, may be committed.

³²Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 71.

³³Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 13.

³⁴Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 76-77; Coakley states that “there was, nonetheless, something to be said for the philosophy that once a decision to use military force had been reached, that force should be shaped to act quickly and decisively. But Adams, Hamilton and McPherson... stretched the president’s legal prerogatives by including regulars (Army) in the expedition.”

³⁵Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 13.

³⁶*Ibid.*, 13.

³⁷*The Fugitive Slave Act of 1850*, 31st Cong., 2nd Sess., (18 September 1850), § 4, 6.

³⁸Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 15; “It is possible that the civil authorities may find it necessary to call in military force to aid in the execution of the law. If such should be the case, and the marshal or any of his deputies shall exhibit to you the certificate of the circuit or district judge of the United States in the State of Massachusetts, stating that in his opinion the aid of a military force is necessary to insure the due execution of the laws, and shall require your aid and that of the troops under your command as part of the posse comitatus, you will place under the control of the marshal yourself and such portion of your command as may be deemed adequate to the purpose. If neither the circuit or district judge shall be in the city of Boston when the exigency above referred to shall occur, the written certificate of the marshal alone will be deemed sufficient authority for you to afford the requisite aid.³²” See also Frederick T. Wilson, *Federal Aid in Domestic Disturbances, 1781-1903*, 67th Cong., 2nd sess., Document no. 263.

³⁹Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 132-133.

⁴⁰Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 16; “The committee are not aware of any reason that exempts the citizens who constitute the military and naval forces of the United States from like liability to duty. Because men are soldiers or sailors, they cease not to be citizens; and while acting under the call and

direction of the civil authority, they may act with more efficiency, and without objection, in an organized form, under appropriate subordinate command.” See also Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878*. (Washington, DC: Government Printing Office, 1988), 130-131.

⁴¹Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 23-24. See also Coakley, Robert W. *The Role of Federal Military Forces in Domestic Disorders 1789-1878*, (Washington, DC: Government Printing Office, 1988), 271.

⁴²Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 271.

⁴³Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 24; These traditionalist governments acted quickly to pass new laws, known as “Black Codes,” severely limiting the rights of blacks. Describing the Southern state leaders’ intent to keep the black population under the thumb of a white government, politician Benjamin F. Flanders stated, “Their [the South’s] whole thought and time will be given to plans for getting things back as near to slavery as possible.”⁶ One exasperated US Army colonel reported to his superior officer his impression of the Southern way of thinking: “Men, who are honorable in their dealings with their white neighbors, will cheat a negro without feeling a single twinge of their honor; to kill a negro they do not deem murder; to debauch a negro woman they do not think fornication; to take property away from a negro they do not deem robbery. . . They still have the ingrained feeling that the black people at large belong to the whites at large.” Johnson’s liberal approach to Reconstruction produced a resurgence of conservative state governments across the South that encouraged unimpeded racism and terror campaigns against the black population.

⁴⁴Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 24.

⁴⁵*Ibid.*, 24; Civil Rights Act Clause: *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offense. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall

have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

⁴⁶Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 15; Southern Democrats wanted federal force to enforce the Fugitive Slave Act, and President Fillmore wanted to utilize federal troops to make it happen. In this way Southern Democrats welcomed the use of the military to enforce the Slave law when it suited them. It is ironic that when virtually the same language was used to enforce freed blacks rights and liberties, Southern Democrats decried the use of federal troops in this manner unconstitutional.

⁴⁷Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 272.

⁴⁸Matt Matthews, “The Posse Comitatus Act and the United States Army: A Historical Perspective” (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 25.

⁴⁹*Ibid.*, 26.

⁵⁰*Ibid.*

⁵¹*Ibid.*, 27.

⁵²*Ibid.*, 29; Matthews notes that by fall of 1871, the Army participated in more than 200 posses just in South Carolina. No numbers given for the other states.

⁵³*Ibid.*, 33.

⁵⁴US Congress, *The Posse Comitatus Act of 1878*, (Knott Amendment), 20th Statute, L., 145. http://www.dojgov.net/posse_comitatus_act.htm (accessed 18 October 2008).

⁵⁵US Congress, Title 10 USC, Section 375. http://www.dojgov.net/posse_comitatus_act.htm (Accessed 18 October 2008).

⁵⁶John R. Brinkerhoff, “The Posse comitatus Act and Homeland Security,” *Homeland Security Journal* (February 2002). <http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm> (accessed 23 September 2008).

⁵⁷Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective* (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 33.

⁵⁸Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789-1878* (Washington, DC: Government Printing Office, 1988), 344.

⁵⁹Eugene P. Visco, “More Than You Ever Want to Know About Posse Comitatus” (MORS Workshop, Homeland Security–Homeland Defense, 2005, Baltimore, MD, November). <http://www.mors.org/meetings/hls/presentations/visco.pdf> (accessed 3 January 2009).

⁶⁰John R. Brinkerhoff, “The Posse comitatus Act and Homeland Security,” *Homeland Security Journal* (February 2002). <http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm> (accessed 23 September 2008).

⁶¹Eugene P. Visco, “More Than You Ever Want to Know About Posse Comitatus” (MORS Workshop, Homeland Security–Homeland Defense, Baltimore, MD, November 2005), Slide 12. <http://www.mors.org/meetings/hls/presentations/visco.pdf> (accessed 3 January 2009).

⁶²John R. Brinkerhoff, “The Posse comitatus Act and Homeland Security,” *Homeland Security Journal* (February 2002). <http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm> (accessed 23 September 2008).

⁶³*Ibid.*

⁶⁴*Ibid.*, The Posse Comitatus Act contains no restrictions on the use of the federalized militia as it did on the regular Army. It is commonly believed, however, that National Guard units and personnel come under the Posse Comitatus Act when they are on federal active duty, and this interpretation is followed today.

⁶⁵*Ibid.*, The history of the law makes it clear that it was not intended to prevent federal police (for example, marshals) from enforcing the law.

⁶⁶Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 21.

⁶⁷Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective* (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 33; quoting Secretary of War George McCrary.

⁶⁸Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 228.

⁶⁹John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 9.

⁷⁰*Ibid.*, 11-12.

⁷¹Ibid., 23.

⁷²Ibid., 102.

⁷³Ibid., 22-25.

⁷⁴Ibid., 25-26.

⁷⁵Ibid.

⁷⁶Ibid., 29

⁷⁷Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 239.

⁷⁸Matthews, Matt, *The Posse Comitatus Act and the United States Army: A Historical Perspective* (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 39. See also Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 230; Secretary Baker unilaterally suspended the Posse Comitatus Act. The author found no record of Congress approving such measure, outside of the Dick Act of 1903, which allowed the Federal government to call up the National Guard for domestic disorders. The problem of the Dick Act is that President Wilson federalized the entire National Guard in July 1917, taking away the States' ability to see them instead of the Army. See also Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 230, quoting the *Glasser Report: Wartime Strikes and the Army*, 25-28, RG 60, NARA.

⁷⁹Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 231, quoted from Dowell, *Military Aid to the Civil Power*, 204-207 and General Order No. 49 (Article 47, para. 383-389, Employment of Troops in the Enforcement of Laws," *Regulations of the United States, 1913* (Corrected to 15 April 1917) (Washington, DC: Government Printing Office, 1917), 106-112.

⁸⁰Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 231; The arrests were in spite of the Ex Parte Milligan Supreme Court doctrine of 1866.

⁸¹John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 32.

⁸²Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 239.

⁸³*Ibid.*, 253.

⁸⁴*Ibid.*, 256.

⁸⁵*Ibid.*

⁸⁶*Ibid.*, 258.

⁸⁷*Ibid.*, 261; This policy also extended to the lumber, mining and steel sectors.

⁸⁸*Ibid.*, 270.

⁸⁹*Ibid.*, 284.

⁹⁰*Ibid.*, 300.

⁹¹*Ibid.*

⁹²John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 30.

⁹³Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 301.

⁹⁴*Ibid.*, 424.

⁹⁵*Ibid.*, 331.

⁹⁶John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 53.

⁹⁷*Ibid.*

⁹⁸*Ibid.*, 72.

⁹⁹See Chapter 1 for definition.

¹⁰⁰*National Security Act of 1947*, Public Law 235, 80th Cong., 1st Sess., 61 Stat. 496 (26 July 1947), § 105B.

¹⁰¹John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 10.

¹⁰²Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 10.

¹⁰³*National Security Act of 1947*, Public Law 235, 80th Cong., 1st Session, 61 Stat. 496 (26 July 1947), § 3.

¹⁰⁴Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 10.

¹⁰⁵*Ibid.*

¹⁰⁶*Ibid.*, 11.

¹⁰⁷*Ibid.*

¹⁰⁸*National Security Act of 1947*, Public Law 235, 80th Cong., 1st Sess., 61 Stat. 496 (26 July 1947), § 105A.

¹⁰⁹*Ibid.*

¹¹⁰*Ibid.*, § 113.

¹¹¹9/11 Commission, “*The 9/11 Commission Final Report*,” 107th Congress (2004), 401.

¹¹²*Ibid.*, These publications listed here have as their central theme DoD support to the interagency: Joint Publication 3-07.4, *Joint Counterdrug Operations*, Joint Publication 3-08, *Joint Interagency Operations*, and Joint Publication 3-27, *Homeland Defense*.

¹¹³John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 116.

¹¹⁴Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 45.

¹¹⁵*Ibid.*, 67.

¹¹⁶*Ibid.*, 75.

¹¹⁷*Ibid.*, 84.

¹¹⁸*Ibid.*, 135

¹¹⁹*Ibid.*, 83, 141.

¹²⁰*Ibid.*, 141.

¹²¹Ibid., 142; Scheips notes that General Abrams may not have known about the Delimitations Agreement the services signed with the FBI in the 1940s.

¹²²Ibid., 142-143.

¹²³Ibid., 143.

¹²⁴Ibid.

¹²⁵John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 153; A pointer index contains the minimum identifying personal data on a subject investigated by an agency, and may include a synopsis of the nature of investigation, r arrest in law enforcement files. It is designed to key the inquirer to the agency that submitted the record to gain further information and potential develop joint investigations on the subject of the search.

¹²⁶Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 144.

¹²⁷Ibid.

¹²⁸Ibid.

¹²⁹Ibid.

¹³⁰Ibid.

¹³¹John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 154.

¹³²Ibid., 154-155.

¹³³Ibid., 155.

¹³⁴Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 157.

¹³⁵John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 155.

¹³⁶Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 208.

¹³⁷John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 155

¹³⁸Ibid., 206

¹³⁹Ibid., 227.

¹⁴⁰Ibid., 227-228.

¹⁴¹Ibid., 156.

¹⁴²Ibid.

¹⁴³Ibid. See also *National Security Act of 1947*, Public Law 235, 80th Cong., 1st Sess., 61 Stat. 496 (26 July 1947), § 105A.

¹⁴⁴Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 248.

¹⁴⁵Ibid., 248.

¹⁴⁶Ibid., 346-347; The federal agencies involved included the FBI, Border Patrol, Department of Justice Community relations, and Park Police; as well as the Washington Metropolitan Police and the National Guard.

¹⁴⁷Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 364.

¹⁴⁸John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 156.

¹⁴⁹Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 351.

¹⁵⁰Ibid., 354-361.

¹⁵¹Ibid., 371-372.

¹⁵²Ibid., 376; Deputy Secretary of Defense Paul H. Nitze at first raised questions to an Army request for 167 officer positions, but granted an increase of 100 positions due to the “importance” of intelligence. Nitze recognized that they would be used domestically as the Department of Justice did not do its part in producing domestic intelligence.

¹⁵³Ibid., 378-379.

¹⁵⁴Ibid., 380.

¹⁵⁵Ibid., 376.

¹⁵⁶John Patrick Finnegan, *Military Intelligence* (Washington, DC: U.S. Army Center of Military History, 1998), 156-157.

¹⁵⁷Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 390.

¹⁵⁸Robert O'Harrow Jr., Interview with Chris Pyle, <http://www.noplaceto hide.net/pyle.html> (accessed 30 November 2008).

¹⁵⁹Ibid. Scheips noted the Justice Department and FBI rebuffed Army efforts to shift more of the domestic surveillance responsibilities to the Justice Department and FBI until the Pyle story broke in the press. Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 390.

¹⁶⁰Ibid.

¹⁶¹Gerald K. Haines, "The Pike Committee Investigations and the CIA," *Studies in Intelligence* (Winter 1998-1999), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html (accessed 9 October 2008).

¹⁶²Ibid.

¹⁶³Ibid.

¹⁶⁴Karl E. Campbell, *Senator Sam Ervin And The Army Spy Scandal Of 1970-1971: Balancing National Security And Civil Liberties In A Free Society*. <http://www.cmhpf.org/senator%20sam%20ervin.htm> (accessed 13 February 2009), "Senator" section.

¹⁶⁵Ibid., "President" section.

¹⁶⁶Ibid.

¹⁶⁷Ibid., "Hearings" section.

¹⁶⁸Ibid.

¹⁶⁹Ibid.

¹⁷⁰Ibid.

¹⁷¹Ibid.

¹⁷²Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 393.

¹⁷³Ibid., 393.

¹⁷⁴Commission on CIA Activities Within the United States, *Report to the President on CIA Activities Within the United States*. (Washington, DC; Government Printing Office, 1975), 271-279.

¹⁷⁵*Ibid.*, 10.

¹⁷⁶*Ibid.*, 10-39; These recommendations are listed in Chapter three of the Rockefeller Commission Report, and also at the end of each of the chapters where the Commission found serious violations.

¹⁷⁷Commission on CIA Activities Within the United States, *Report to the President on CIA Activities Within the United States* (Washington, DC; Government Printing Office, 1975), 40.

¹⁷⁸*Ibid.*, 22-23.

¹⁷⁹*Ibid.*, 23.

¹⁸⁰*Ibid.*, 18, 23

¹⁸¹*Ibid.*

¹⁸²Gerald K. Haines, “The Pike Committee Investigations and the CIA,” *Studies in Intelligence* (Winter 1998-1999), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html (accessed 9 October 2008).

¹⁸³*Ibid.*

¹⁸⁴Senate, *Book III: National Security Agency Surveillance Affecting Americans*, 94th Cong. 2nd Sess., 1976. <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIj.htm> (accessed 2 February 2009), Section I.

¹⁸⁵Senate, *Book I: Foreign and Military Intelligence*, 94th Cong. 2nd Sess., 1976. http://www.aarclibrary.org/publib/church/reports/book1/html/ChurchB1_0182b.htm (accessed 14 February 2009), 356.

¹⁸⁶Senate, *Book III: National Security Agency Surveillance Affecting Americans*, 94th Cong. 2nd Sess., 1976. <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIj.htm> (accessed 2 February 2009), Section I.

¹⁸⁷*Ibid.*

¹⁸⁸*Ibid.*, Section II.

¹⁸⁹*Laird v. Tatum*, 408 U.S. 1 (1972), 1; The term “justiciable” according to MSN Encarta online dictionary,

http://encarta.msn.com/dictionary_1861623552/justiciable.html: 1) liable for trial: able or required to be in a court of law; 2) capable of being settled in court: able to be settled by applying the principles of law

¹⁹⁰Laird v. Tatum, 408 U.S. 1 (1972), 1.

¹⁹¹Ibid., 5-6.

¹⁹²Ibid., 6. The Supreme Court affirmed the Appellate Courts framing of the problem, in that the collection methods listed in the text were not different that what the news media employs to gather information. The Court also noted a lack of evidence for illegal searches, and no claim of physical arm, only a “might harm *someone* in the future at an *unknown* time.”

¹⁹³Laird v. Tatum , 408 U.S. 1 (1972), 9.

¹⁹⁴Ibid., 11-12; In recent years, this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *E.g.*, *Baird v. State Bar of Arizona*, 401 U. S. 1 (1971); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Lamont v. Postmaster General*, 381 U. S. 301 (1965); *Baggett v. Bullitt*, 377 U. S. 360 (1964). In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging. For example, the petitioner in *Baird v. State Bar of Arizona* had been denied admission to the bar solely because of her refusal to answer a question regarding the organizations with which she had been associated in the past. In announcing the judgment of the Court, Mr. Justice Black said that "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."

¹⁹⁵Laird v. Tatum , 408 U.S. 1 (1972), 16-20.

¹⁹⁶Ibid., 29-30.

¹⁹⁷Ibid., 5-6.

¹⁹⁸Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992*, (Washington, DC: U.S. Army Center of Military History, 2005), 434.

¹⁹⁹Ibid., 435-436.

²⁰⁰Ibid., 436-437.

²⁰¹United States v. Red Feather, 392 F. Supp. 916 (D.C.S.D. 1975)

²⁰²Ibid.

²⁰³Ibid., 18 U.S.C. § 1385 was intended *922 by Congress, according to the legislative history found in 7 Cong. Rec. 3845-3852, 4240- 4248, 4295-4304, and 4688, to eliminate the direct active use of federal troops by civil law enforcement officers. The prevention of the use of military supplies and equipment was never mentioned in the debates, nor can it reasonably be read into the words of the Act. . . . The congressional debates also clearly reveal that Congress did not intend by 18 U.S.C. § 1385 to prohibit the use of Army or Air Force materiel or equipment of whatever kind to execute the laws. The language of this interpretation and the conclusion reached is borrowed almost verbatim from, and therefore agrees with, the interpretation and conclusion on the same point reached by Judge Urbom in United States v. Jaramillo, 380 F.Supp. 1375, 1379 (1974). Congress did not intend to prevent the use of Army or Air Force materiel or equipment in aid of execution of the laws. Moreover, through enactment of the Economy Act of 1932, 31 U.S.C. § 686, Congress has provided extremely broad authorization for any executive department or independent establishment to place orders with any other willing department for materials, supplies, equipment, work, or service. A 1932 House Report of the 72d Congress set out the legislative intent of these Economy Acts: “A free interchange of work . . . will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities of their own The War and Navy Departments are especially well equipped to furnish materials, work, and services for other department H.R.Rep. no. 1126, 72nd Cong., 1st Sess. (1932).” This Court agrees with the conclusion of Judge Urbom in United States v. Jaramillo, 380 F.Supp. 1375 (1974)

²⁰⁴United States v. Red Feather, 392 F. Supp. 916 (D.C.S.D. 1975)

²⁰⁵Ibid., Words in [] are to amplify the active role and passive roles defined by the Court.

²⁰⁶Senate, *Book III: National Security Agency Surveillance Affecting Americans*, 94th Cong., 2nd Sess. (1976), Section III. <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIj.htm> (accessed 2 February 2009).

²⁰⁷Ibid., Section IV.

²⁰⁸Ibid.

²⁰⁹Ibid.

²¹⁰Ibid.

²¹¹Ibid.

²¹²Ibid., Section V.

²¹³Ibid.

²¹⁴Ibid.

²¹⁵Ibid.

²¹⁶Ibid.

²¹⁷Ibid., Section VI.

²¹⁸Ibid.

²¹⁹Ibid., Section I.

²²⁰L. Britt Snyder, “Unlikely SHAMROCK—recollections from the Church Committee's Investigation of NSA,” *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans* (1976). http://cicentre.com/Documents/DOC_ChurchPike_Snider.htm (accessed 22 September 2008).

²²¹Ibid., Items the NSA screened for included telegrams sent by foreign establishments in the United States or telegrams that appeared to be encrypted. The briefer stated the Secretary of Defense canceled the program earlier in the year as “the program just wasn’t producing very much of value.”

²²²Senate, *Book III: National Security Agency Surveillance Affecting Americans*, 94th Cong., 2nd Sess. (1976). <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIj.htm> (accessed 2 February 2009), Section I and III.

²²³Ibid., Section II.

²²⁴Ibid., Section I. The Bureau of Narcotics and Dangerous Drugs (BNDD) became the Drug Enforcement Administration (DEA) in 1973 and is charged with enforcing Title 21 of the U.S. Code.

²²⁵Senate, *Book III: National Security Agency Surveillance Affecting Americans*, 94th Cong., 2nd Sess. (1976). <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIj.htm> (accessed 2 February 2009), Section IV.

²²⁶Ibid., Section I.

²²⁷Ibid., Section II.

²²⁸Ibid., Section II.

²²⁹NationMaster Encyclopedia, “Sam Ervin,” <http://www.nationmaster.com/encyclopedia/Sam-Ervin> (accessed 13 February 2009).

²³⁰*Foreign Intelligence and Surveillance Act of 1978*, Public Law 95-511, 95th Cong. (25 October 1978), § 101.

²³¹*Ibid.*, § 103.

²³²*Ibid.*, § 105.

²³³*Ibid.*, § 102. The Attorney General must certify the proposed minimization procedures at least 30 days before commencement of the intercept to the Congressional Committees. With this done, the government can intercept for one year without a warrant, provided no U.S. person's communications are intercepted. Due to the cumbersome requirements and a sometimes fickle Intelligence Committee, the FISA court is rarely used in recent times.

²³⁴*Foreign Intelligence and Surveillance Act of 1978*, Public Law 95-511, 95th Congress (25 October 1978), § 105.

²³⁵*Ibid.*, § 109-110 and Title II.

²³⁶*Ibid.*, § 201; The 9/11 Commission Final Report noted: "In addition to requiring court review of proposed surveillance (and later, physical searches), the 1978 Act was interpreted by the courts to require that a search be approved only if its "primary purpose" was to obtain foreign intelligence information. In other words, the authorities of the FISA law could not be used to circumvent traditional criminal warrant requirements." (p.78) In effect, the Commission recognized that the FISA court was to be used only if a regular court order could not.

²³⁷National Commission on Terrorist Attacks Upon the United States. "*The 9/11 Commission Final Report*" (Washington, DC: Government Printing Office, 2004), 274; According to the statutory requirement under FISA, in order to obtain a FISA warrant on Moussaoui, the FBI needed to demonstrate probable cause that Moussaoui was an agent of a foreign power, a demonstration that was not required to obtain a criminal warrant.

²³⁸*Ibid.*, 78-80; The Report also cites numerous times where the FBI, and to some extent the Department of Justice, misinterpreted the FISA law. The pages here give a sampling of that.

²³⁹National Public Radio (NPR), "Timeline: America's War on Drugs." <http://www.npr.org/templates/story/story.php?storyId=9252490> (accessed 9 October 2008).

²⁴⁰Phillip B. Gleason, "The War on Drugs: Unending LIC or Attainable Security." <http://www.globalsecurity.org/military/library/report/1993/GPB.htm> (accessed 17 February 2009).

²⁴¹*The National Defense Authorization Act of 1989*, Public law 100-456, 100th Cong.s, 2nd Sess., (29 September 1988), Title XI.

²⁴²Ibid.

²⁴³Donald J. Mabry, "Military Drug Interdiction in the Caribbean Basin," *Conflict Quarterly* 13, no. 2 (Spring 1993), 49.

²⁴⁴Ibid., 50. The Act does preclude military personnel from participating in searches, seizure and arrest activities normally performed by law enforcement, unless those personnel are already authorized by law, such as the Coast Guard.

²⁴⁵*The National Defense Authorization Act of 1989*, Public Law 100-456, 100th Cong., 2nd Sess., (29 September 1988), Title XI.

²⁴⁶Ibid.

²⁴⁷Ibid.

²⁴⁸Ibid.

²⁴⁹Ibid.

²⁵⁰National Guard Bureau, NGR 500-2, "National Guard Counterdrug Support" (Washington, DC: Department of the Army and Air Force, 1997), Section 6-14.

²⁵¹*The National Defense Authorization Act of 1989*, Public Law 100-456, 100th Cong., 2nd Sess., (29 September 1988), Title XI.

²⁵²Ibid., Title XI.

²⁵³News4 (TV), "Illegals From Terrorist Nations are Crossing the Border Into Arizona." <http://www.kvoa.com/Global/story.asp?S=2172749> (accessed 18 February 2009).

²⁵⁴Ibid., News 4 cited the report in the Tombstone Tumbleweed, the local newspaper in Tombstone Arizona, unknown date of the paper in 2004.

²⁵⁵News 4 (TV), "Illegals From Terrorist Nations are Crossing the Border Into Arizona." <http://www.kvoa.com/Global/story.asp?S=2172749> (accessed 18 February 2009); Bonner has knowledge of the details of who agents are detaining and what they are finding out about them.

²⁵⁶*USA PATRIOT Act of 2001*, Public Law 107-56, 107th Cong., 1st Sess. (26 October 2001), § 203. See also *Foreign Intelligence Surveillance Act of 1978*, Public Law 95-511, 95th Cong., 2nd Sess. (25 October 1978), § 101.

²⁵⁷Ibid., § 203.

²⁵⁸9/11 Commission, “*The 9/11 Commission Final Report*,” 107th Congress (2004), 328.

²⁵⁹*USA PATRIOT Act of 2001*, Public Law 107-56, 107th Cong., 1st Sess., (26 October 2001), § 902. See also 9/11 Commission, “*The 9/11 Commission Final Report*,” 107th Congress (2004), 46-48.

²⁶⁰*USA PATRIOT Act of 2001*, Public Law 107-56, 107th Cong., 1st Sess. (26 October 2001), § 903

²⁶¹*Ibid.*, § 907.

²⁶²*Intelligence Authorization Act for Fiscal Year 2003*, Public Law 107-306, 107th Cong., 2nd Sess. (27 November 2002), § 601-602.

²⁶³*Ibid.*, § 603-604.

²⁶⁴Report release date is not in the actual report but posted on the 9/11 Commission website, <http://www.9-11commission.gov/> (accessed 18 February 2009).

²⁶⁵9/11 Commission, “*The 9/11 Commission Final Report*,” 107th Congress (2004), 86-87.

The intelligence components involved included from the Department of Defense: National Security Agency, National Geospatial Agency, Defense Intelligence Agency, National Reconnaissance Office, and the intelligence components of the Army, Navy, Air Force, and Marines. In addition the other federal agencies the Commission looked at include the Central Intelligence Agency, the Federal Bureau of Investigation—intelligence community and national security, The State Department—Bureau of Intelligence and Research, Treasury Department—intelligence component, Department of Energy—Office of Intelligence and Counterintelligence, Coast Guard—Office of Intelligence, and the Department of Homeland Security—Directorate of Intelligence Analysis and Infrastructure Protection.

²⁶⁶*Ibid.*, 88.

²⁶⁷*Ibid.*, 87.

²⁶⁸*Ibid.*, 87-88.

²⁶⁹*USA PATRIOT Act of 2001*, Public Law 107-56, 107th Cong., 1st Sess. (26 October 2001), §207, 214, 225.

²⁷⁰9/11 Commission, “*The 9/11 Commission Final Report*,” 107th Congress (2004), 268-271.

²⁷¹*Ibid.*, 271.

²⁷²Ibid., 91.

²⁷³Ibid.

²⁷⁴Ibid., 352, 371.

²⁷⁵Ibid., 187.

²⁷⁶Ibid., 385.

²⁷⁷Ibid., 392.

²⁷⁸Ibid., 393.

²⁷⁹David Barton, interview by author, Kansas City, MO, 25 November 2008.

²⁸⁰Ibid., 394.

²⁸¹Ibid.

²⁸²Ibid., 396.

²⁸³Ibid., 399-403.

²⁸⁴Ibid., 403.

²⁸⁵Ibid., 401.

²⁸⁶United States v. Red Feather, 392 F.Supp. 916 (D.C.S.D. 1975); Moreover, through enactment of the Economy Act of 1932, 31 U.S.C. § 686, Congress has provided extremely broad authorization for any executive department or independent establishment to place orders with any other willing department for materials, supplies, equipment, work, or service. As far back as 1915 Congress established procedures for the War and Navy Departments to procure or perform services for each other. 38 Stat. 1084 (1915). In 1920 these procedures were extended to any government department which procured by purchase or manufacture stores or materials, or performed services for any other department. 41 Stat. 613 (1920). A 1932 House Report of the 72d Congress set out the legislative intent of these Economy Acts: "A free interchange of work . . . will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities of their own . . . The War and Navy Departments are especially well equipped to furnish materials, work, and services for other department Whenever such materials, work and services can be furnished at less cost your committee believes that private concerns should not be called upon to furnish, do, and perform what Government agencies can do for each other. H.R.Rep. No. 1126, 72d Cong., 1st Sess. (1932)." This Court agrees with the conclusion of Judge Urbom in United States v. Jaramillo, 380 F.Supp. 1375 (1974).

²⁸⁷9/11 Commission, “*The 9/11 Commission Final Report*,” 107th Congress (2004), 404.

²⁸⁸The High Intensity Drug Trafficking Area program is a congressionally mandated initiative of the Office of national Drug Control Policy. Began in 1996, the HIDTA program seeks to encourage collaboration and intelligence sharing between federal, state and local law enforcement agencies conducting narcotics investigations. In 2006, the ONDCP launched the Domestic Highway Enforcement initiative, as the ONDCP understood that the roads are the lines of communication for drug and other illegal activity. The DHE focus is on all crime, but as narcotics are mostly moved by road, it has a greater impact on the flow of narcotics, as well as the flow of drug proceeds back to suppliers in the Southwestern U.S.

²⁸⁹9/11 Commission, *The 9/11 Commission Final Report*, 107th Congress (2004), 407-410.

²⁹⁰*Ibid.*, 417.

²⁹¹*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 1016.

²⁹²*Ibid.*

²⁹³*Ibid.*, § 1021.

²⁹⁴9/11 Commission, *The 9/11 Commission Final Report*, 107th Congress (2004), 399-400.

²⁹⁵*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 1021.

²⁹⁶*Ibid.*, § 1023.

²⁹⁷*Ibid.*

²⁹⁸*Ibid.*, § 1041.

²⁹⁹*Ibid.*

³⁰⁰Department of Defense, *DoD Directive 5143.01, Undersecretary of Defense for Intelligence* (Washington, DC: Government Printing Office, 2005).

³⁰¹Joint Chiefs of Staff, Joint Publication 3-08, *Interagency, Intergovernmental Organization, and Non-governmental Organization Coordination During Joint Operations, Volume I* (Washington, DC: Joint Education and Doctrine Division, 17 March 2006), I-1.

³⁰²*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), Title VII, § 7101. 1) Long-term success in the war on terrorism demands the use of all elements of national power, including diplomacy, military action, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense. 2) To win the war on terrorism, the United States must assign to economic and diplomatic capabilities the same strategic priority that is assigned to military capabilities.

³⁰³Joint Chiefs of Staff, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Joint Education and Doctrine Division, 12 July 2007), I-2.

³⁰⁴*Ibid.*, § 1074.

³⁰⁵9/11 Commission, “The 9/11 Commission Final Report,” 107th Congress, (2004), 408-410.

³⁰⁶Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders 1945-1992*, (Washington, DC: U.S. Army Center of Military History, 2005), 394.

³⁰⁷Commission on CIA Activities Within the United States, *Report to the President on CIA Activities Within the United States* (Washington, DC: Government Printing Office, 1975), ix-xi.

³⁰⁸Executive Order no. 11905, Federal Register 41 (18 February 1976): 7703, § 4.

³⁰⁹*Ibid.*

³¹⁰Department of Defense, *DoD Directive 5200.27: Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense* (Washington, DC: Government Printing Office, 1980).

³¹¹Executive Order no. 11905, Federal Register 41 (18 February 1976): 7703, § 1.

³¹²*Ibid.*, § 5.

³¹³*Ibid.*

³¹⁴Executive Order no. 12333, Federal Register 73 (4 August 2008), Part 1.1.

³¹⁵*Ibid.*

³¹⁶*Ibid.*, Part 2.3. See also *Intelligence Reform Act of 2004*, Public Law 108-458, 108th Con., 2nd Sess. (17 December 2004), § 1052.

³¹⁷*Laird v. Tatum*, 408 U.S. 1 (1972), 6.

³¹⁸Department of Defense, *DoD Directive 5525.5: Department of Defense Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 1986), 2.

³¹⁹Executive Order no. 12333, Federal Register 73 (4 August 2008), Part 2.3.

³²⁰DEA–El Paso Intelligence Center (EPIC), brief given to Midwest High Intensity Drug Trafficking Area- Domestic Highway Enforcement Regional Coordination Committee, El Paso, TX, 2 October 2008.

³²¹Department of Defense, *DoD Directive 5240.1: Department of Defense Intelligence Activities* (Washington, DC: Government Printing Office, 1988), 1.

³²²Department of Defense, *DoD Directive 5525.5: Department of Defense Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 1986), 2, 9-10, 18-19.

³²³Title 18, U.S. Code, § 1385; Originally passed as the Knott Amendment to the 1878 Army Appropriations bill, 45th Cong., 1st Sess. (1877); Codified under Title 18 U.S. Code in 1956.

³²⁴Executive Order no. 12333, Federal Register 73 (4 August 2008), Part 2.6.

³²⁵*Ibid.*, Part 2.3.

³²⁶Department of Defense, *DoD Directive 5240.1: Department of Defense Intelligence Activities* (Washington, DC: Government Printing Office, 1988), 2, 4.

³²⁷Department of Defense, *DoD Directive 5143.01: Under Secretary of Defense for Intelligence* (Washington, DC: Government Printing Office, 2005), Enclosure 2.

³²⁸Executive Order no. 12333, Federal Register 73 (4 August 2008), Part 2.3.

³²⁹*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 5401 and 7401.

³³⁰*The Economy Act of 1932*, 31 U.S.C. § 1535. 45th Cong., 2nd Sess. (30 June 1932).

³³¹*United States v. Red Feather*, 392 F.Supp. 916 (D.C.S.D. 1975).

³³²Department of Defense, *DoD Directive 5525.5: Department of Defense Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 1986), 2, 9-10, 18-19.

³³³Dr. Steven Bucci, Deputy Assistant Secretary of Defense, Homeland Defense and America's Security Affairs, Speech to the Command and General Staff College – Intermediate Level Education class 09-001, given 31 October 2008.

³³⁴Executive Order no. 12333, Federal Register 73 (4 August 2008), Part 2.3.

³³⁵*Military Support for Civilian Law Enforcement Agencies*, Public Law 97-86. 97th Cong., 1st Sess., 10 U.S.C. § 371 (1 December 1981).

³³⁶Executive Order no. 12333, Federal Register 73 (4 August 2008), Parts 2.4 and 3.5; The radio direction finding is specifically mentioned in Part 3.5. The principle behind the ground surveillance radars and REMBASS is they watch a specific geographic area where no reasonable expectation of privacy exists. The legal term for where these systems would be employed is call the open field doctrine”

³³⁷Department of Defense, *DoD Regulation 5240.1-R: Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 38-39; This regulation has not been updated since 1982, and has not kept up with technological innovations within the military, let alone the application to the narcotics and terrorism fights.

³³⁸Department of Defense, *DoD Directive 5525.5: Department of Defense Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 1986), 18-19.

³³⁹*The National Defense Authorization Act of 1989*, Public law 100-456, 100th Cong., 2nd Sess. (29 September 1988), Title XI. See also Enclosure 4 to DoD Directive 5525.5, paragraph E4.1.6.2.4.

³⁴⁰*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004). See also Enclosure 4 to DoD Directive 5525.5, paragraph E4.1.6.2.4 and paragraph E4.3.2.1.

³⁴¹Department of Defense, *DoD Directive 5525.5: Department of Defense Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 1986), 17-18, 21.

³⁴²Department of Defense, *DoD Regulation 5240.1-R: Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 2.

³⁴³*Ibid.*, 13.

³⁴⁴*Ibid.*

³⁴⁵*Ibid.*, 18.

³⁴⁶National Guard Bureau, NGR 500-2: *National Guard Counterdrug Support* (Washington, DC: Government Printing Office, 2000), 10.

³⁴⁷Department of Defense, *DoD Regulation 5240.1-R: Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 16-17.

³⁴⁸*Ibid.*, 16-18.

³⁴⁹*Laird v. Tatum*, 408 U.S. 1 (1972). See also *United States v. Red Feather*, 392 F.Supp. 916 (D.C.S.D. 1975).

³⁵⁰*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 1052.

³⁵¹*Ibid.*, 16.

³⁵²Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), I-5-6.

³⁵³Department of Defense, *DoD Regulation 5240.1-R: Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 20-21.

³⁵⁴Department of the Army, AR 381-10: *U.S. Army Intelligence Activities* (Washington, DC: Government Printing Office, 2007), 7.

³⁵⁵ *Ibid.*, 20.

³⁵⁶National Guard Bureau, NGR 500-2: *National Guard Counterdrug Support* (Washington, DC: Government Printing Office, 2000), 20.

³⁵⁷*Ibid.*, 12.

³⁵⁸Department of Defense, *DoD Regulation 5240.1-R: Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 22-23.

³⁵⁹*Ibid.*

³⁶⁰National Guard Bureau, NGR 500-2: *National Guard Counterdrug Support* (Washington, DC: Government Printing Office, 2000), 20-23.

³⁶¹Department of Defense, *DoD Regulation 5240.1-R: Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 24.

³⁶²Department of the Army, AR 381-10: *U.S. Army Intelligence Activities* (Washington, DC: Government Printing Office, 2007), 9.

³⁶³Department of the Army, AR 381-10: *U.S. Army Intelligence Activities* (Washington, DC: Government Printing Office, 1984),6.

³⁶⁴*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 5201.

³⁶⁵Department of Defense, DoD Regulation 5240.1-R: *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 25.

³⁶⁶*Ibid.* 38.

³⁶⁷*Ibid.*

³⁶⁸*Ibid.*, 39.

³⁶⁹*Oliver v. United States*, 466 U.S. 170 (1984)

³⁷⁰National Guard Bureau, NGR 500-2: *National Guard Counterdrug Support* (Washington, DC: Government Printing Office, 2000), 13.

³⁷¹Department of Defense, DoD Regulation 5240.1-R: *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 47.

³⁷²*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 5201.

³⁷³National Guard Bureau, NGR 500-2: *National Guard Counterdrug Support* (Washington, DC: Government Printing Office, 2000), 13.

³⁷⁴Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), I-5-6.

³⁷⁵National Guard Bureau, NGR 500-2: *National Guard Counterdrug Support* (Washington, DC: Government Printing Office, 2000), 13.

³⁷⁶Dr. Steven Bucci, Deputy Assistant Secretary of Defense, Homeland Defense and America's Security Affairs, Speech to the Command and General Staff College, Intermediate Level Education Class 09-01, Fort Leavenworth, KS, 31 October 2008.

³⁷⁷Department of the Army, AR 381-10: *U.S. Army Intelligence Activities* (Washington, DC: Government Printing Office, 2007), 17.

³⁷⁸Ibid.

³⁷⁹Department of Defense, DoD Regulation 5240.1-R: *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 30.

³⁸⁰Ibid., 56-57.

³⁸¹Ibid., 56.

³⁸²Ibid., 57.

³⁸³*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess.n (17 December 2004), § 1051.

³⁸⁴Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), I-1.

³⁸⁵Richter, Paul, "Military Easing Its War on Drugs," *Los Angeles Times*, 20 October 2002. <http://articles.latimes.com/2002/oct/20/world/fg-mildrugs20> (accessed 14 March 2009).

³⁸⁶The White House, *National Security Decision Directive 221: Narcotics and National Security*. Washington, DC (8 April 1986), 1. <http://www.fas.org/irp/offdocs/nsdd/nsdd-221.htm> (accessed 14 March 2009).

³⁸⁷Ibid., Fact Sheet.

³⁸⁸Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), I-11.

³⁸⁹Ibid., II-11.

³⁹⁰Ibid., See also *Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 7202 and inferred under § 1021.

³⁹¹Department of Defense, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Government Printing Office, 2007), I-1.

³⁹²Ibid., I-2.

³⁹³*National Security Act of 1947*, Public Law 235, 80th Cong., 1st Sess., 61 Stat. 496 (26 July 1947), § 402.

³⁹⁴Department of Defense, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Government Printing Office, 2007), I-5.

³⁹⁵Ibid.

³⁹⁶David Barton, interview by author, Kansas City, MO, 25 November 2008.

³⁹⁷Department of Defense, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Government Printing Office, 2007), I-7.

³⁹⁸United States v. Red Feather, 392 F.Supp. 916 (D.C.S.D. 1975).

³⁹⁹Department of Defense, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Government Printing Office, 2007), I-11.

⁴⁰⁰*Ibid.*

⁴⁰¹*Ibid.*, I-8.

⁴⁰²Department of Defense, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Government Printing Office, 2007), IV-2.

⁴⁰³*Ibid.*, VII-2.

⁴⁰⁴*Ibid.*, IV-5.

CHAPTER 5

ANALYSIS OF CAPABILITIES AND REQUIREMENTS

Introduction

In Chapter 4, this thesis showed that by statutory and case law, military intelligence in a Title 10 status can support domestic law enforcement with passive measures in counterdrug and counterterrorism operations. The limiting factor to this is Department of Defense (DoD) policy, which has not been updated since 1984. Next to consider is what military intelligence capabilities can be used domestically, and what military intelligence capabilities does law enforcement desire to use domestically in counterdrug and counterterrorism operations. The research found that for all the capabilities that military intelligence can legally use domestically, law enforcement desires to use each them.

This chapter has two sections. The first deals with military intelligence capabilities in personnel, analytical expertise, linguists, intelligence training, intelligence systems, military intelligence information, and military benefit to providing the aforementioned items. The second section identifies what law enforcement desires assistance from the military intelligence community in support of their counterdrug and counterterrorism operations.

Military Intelligence Capabilities

Secondary Research Question No. 2: What does the military intelligence community have to offer law enforcement by way of support in the counter-narco-terrorism (CNT) and War on Terror (WOT) fights?

Military intelligence can support law enforcement with passive measures in counterdrug and counterterrorism operations domestically. The military intelligence component possesses several means of providing this support. Areas military intelligence can support with passive measures include personnel for analysis, intelligence related training, intelligence collection platforms and database programs, and foreign intelligence information. Lastly, this paper will look at the benefit the military would derive from the above mentioned support.

Personnel

The first and foremost area military intelligence can support law enforcement is through intelligence planning and analytical support. This position is supported in principle by GEN Petraeus, who stated to the Intermediate level Education Course 09-01 at Fort Leavenworth the Army needs to look at assigning personnel to the interagency to support the interagency and gain understanding of the interagency process.¹ The 9/11 Commission final report identified intelligence capability as a critical shortfall in the interagency outside of DoD, especially in the Federal Bureau of Investigation (FBI).² The Intelligence Reform and Surveillance Act of 2004 also called on the FBI to improve its intelligence capability.³ This is in addition to the counterdrug support to the interagency authorized by the National Defense Authorization Act of 1989.⁴ The military intelligence component possesses a large cadre of trained analysts that already possess the top-secret security clearance required by the FBI. Clearance issues are handled by the Director of Central Intelligence Directive No. 6/4, which stated federal agencies are to honor same level security clearances issued by another federal agency, with exceptions granted on a

case by case basis.⁵ An Office of Management and Budget memorandum extended the Directive 6/4, incorporated into Executive Order 12968, to special access programs.⁶

The Army possesses several military occupational specialties (MOS) that qualify to perform an analytical function. The primary MOS are the 35D military intelligence officer, 350F All source intelligence warrant officer, and the 35F intelligence analyst. The counterintelligence MOS of 35E Counterintelligence officer, 351E counterintelligence warrant, and 35L counterintelligence agent can also be used, as they undergo extensive link analysis training as part of their MOS schooling. These analysts possess the requisite knowledge and capacity to build analytical products regarding narcotics and terrorist organizations. The vast majority of narcotics and terrorism cases investigated by federal agencies tie to international organizations, as this is the federal agencies' mandate to pursue up the chain of command and dismantle narcotics and terrorist organizations. Many of these cases tie in to areas the U.S. Military is presently deployed to, or may be deployed to in the future.

Intelligence planning as defined in Joint Publication (JP) 3-27 is referred to as counterdrug intelligence preparation for operations and entails "an intellectual process of analysis and evaluation that is modified from the traditional military joint intelligence preparation of the operational environment."⁷ This process identifies the most likely trafficking routes and venues and the most efficient way to employ resources to identify, track and assist law enforcement to arrest traffickers.⁸ This process works in counterterrorism operations as well, as the groups have similar methodologies to execute operations. The process follows the military intelligence preparation of the environment model, and applies the model to the facets of narcotics trafficking, terrorism, and alien

smuggling analysis. Military intelligence analysts can use this process to identify specific routes and some pattern of life analysis for specific drug or terrorist organizations based on the type of support the law enforcement agency (LEA) requested, freeing up the law enforcement officers and agents to do more field investigating.

Along with this intelligence planning follows collection planning. The intelligence planning identifies gaps in intelligence. The next step is to develop a collection plan to fill those gaps in intelligence. Military intelligence develops collection plans to answer information gaps on a regular basis from the tactical level through strategic level. Once the commander approves the plan, he or she takes ownership of it, and directs the military intelligence community to execute the approved plan. Assigned military analysts then assist in answering the collection plan requirements, using open source information, aerial and ground reconnaissance assets, and intelligence databases to build the intelligence picture and prepare it for the supported LEA to disseminate it. This model fits with what JP 3-07.4 calls for in counterdrug operations.⁹ In the context of support to domestic law enforcement, the LEA supervisor is the approver of the collection plan after consulting with the agency's legal counsel, United States Attorney, or district attorney. The military analysts then carry out the plan under the supervision of the LEA supervisor or designated law enforcement officer.

The military intelligence community possesses a robust linguist capability, a shortfall of the domestic law enforcement and intelligence community. The Intelligence Reform and Surveillance Act of 2004 recognized the need for linguist support in the interagency and intelligence agencies and called for the Director of National Intelligence to identify linguist shortfalls and develop a plan to fill these shortfalls.¹⁰ The military

intelligence community possesses language skills for most areas that terrorist organizations and narcotics trafficking organizations operate in that affect the United States.

Training

Current DoD regulations limit advanced high intensity training, such as tactics, techniques, and procedures for arrest and seizure of a criminal subject, sniper training, military operations in urban terrain, close quarters combat training and like-type training.¹¹ However, the regulations do allow for providing expert advice and training that does not involve a likelihood of contact with a hostile U.S. person.¹² Military intelligence units have training packages for include collection management, intelligence preparation of the environment in an urban environment, counterintelligence, antiterrorism and counterterrorism intelligence training.

Systems

The military possesses several systems of benefit to law enforcement in counterdrug and counterterrorism operations, and at the same time provide realistic training for military intelligence units between deployments. These systems include Unmanned Aerial Vehicles (UAV), remote battlefield sensor system, radar, intelligence analysis programs, and the Secure Internet Protocol Network (SIPRNet).

Congress recognized the utility of UAV systems when it mandated that the Department of Homeland Security develop a plan to monitor the Southwest border using the vehicles.¹³ A UAV system uses a terminal and joystick to fly an aircraft with no human on board. A live feed from the camera on board the UAV is on the pilot's screen,

and the pilot can manipulate the camera or other sensors as well as the aircraft. These sensor feeds can be digitally recorded for later use in court or other operations. The UAVs give utility to DEA as well, such as monitoring potential clandestine laboratory sites and marijuana grow sites in remote areas of national parks in the western United States, where it is difficult to access or maintain surveillance without being detected by drug traffickers.

Complementary to the UAV are remote battlefield sensors (REMBASS) to monitor drug or alien smuggling paths in terrain that is difficult to access. Law enforcement can use these REMBASS sensors to alert a UAV into an area where REMBASS detected activity. Thus, REMBASS allows for economy of effort by monitoring drug and alien routes not heavily used, providing time for another detection system or law enforcement personnel to reach the area before the traffickers leave the area.

REMBASS contain three types of sensors: magnetic, seismic and passive infrared.¹⁴ The magnetic sensors detect vehicles and persons carrying ferrous metal, the number of vehicles passing the system, and can give direction of travel.¹⁵ This type is good for vehicular routes or where suspected arms smuggling routes are located. Seismic sensors detect vibrations of vehicular and human movement, and would be good for trails utilized by pack mules or persons with backpacks carrying contraband.¹⁶ Passive infrared sensors detect vehicles and personnel, number of vehicles passing the system, and give direction of travel.¹⁷ Newer sensors can also detect tunneling activity, and would be useful along the borders where drug trafficking organizations tunnel under the border to import their narcotics into the United States.

Relocatable Over the Horizon Radar (ROTHR), ground based radar (GBR), and ground surveillance radar (GSR) provide long range coverage of approaches where few line of sight obstacles exist. ROTHR are good for sea approaches, or use in the Great Lakes region to monitor traffic entering the United States from Canada.¹⁸ GSR and GBR are effective where terrain is generally flat, or even, such as along the northern border and in places along the southern border of the United States. Depending on the terrain, the radar can give roughly thirty minutes of monitoring and warning to queue other intelligence assets or law enforcement to the area. These radars have utility in both counterdrug and counterterrorism operations.

Organization Risk Analyzer (ORA) is a software program designed by Carnegie Mellon University, Institute for Software Research International, and the Center for Computational Analysis of Social and Organizational Systems for the military's use in mapping terrorist and insurgent group organizational relationships.¹⁹ The software is designed to identify critical links or vulnerabilities in an organization to focus targeting of resources to disrupt the entire organization through as few links as possible by identifying relationships among its members, resources, knowledge and tasks.²⁰

Information

The SIPRNet is both a system and a source of information that houses both counterdrug and counterterrorism information of use to law enforcement. The system provides a secure network to the SECRET level for information flow within and between the interagency. Both the Drug Enforcement Administration (DEA) and the FBI can access through a portal on their internal secure systems. With the system already built and operational, the Department of Homeland Security could have utilized this network

under the Economy Act as well, saving the taxpayers 337 million dollars.²¹ The Deputy Assistant Secretary of Defense for Counternarcotics authorized the SIPRNet system to be emplaced in thirty-two High Intensity Drug Trafficking Area (HIDTA)–Investigative Support Centers in 2003 to provide the interagency access to DoD classified narcotics and terrorist information.²²

Military Benefit

The military gains several benefits to this support. First, it complies with federal law to support the interagency in the counterdrug and counterterrorism fights. Second, by supporting the interagency in these endeavors, military personnel build long term relationships they can utilize when deployed as they need interagency support. Third, by supporting the interagency with analysts, the military intelligence analyst can maintain perishable skills in supporting counterinsurgency operational analysis, as terrorism and narcotics trafficking employ similar skill sets. Examples of this are linguists who support counterdrug and counterterrorism operations get realistic live training to maintain and increase their language proficiency; counterintelligence officers that are able to learn from law enforcement tactics, techniques and procedures to better the skill set for use overseas; and UAV and radar operators are able to do real world mission support to maintain their skills between deployments on live operations. Fourth, due to reciprocity, the military can acquire early warning of potential threats to its personnel and facilities globally. Finally, DoD can claim credit for saving government resources under the Economy Act, and use that argument for continued stable funding.

To expand on the use of counterintelligence agents in a passive role as analysts, these agents can also derive some benefit in working analytical support to law

enforcement. If working in support of tactical intelligence support to another federal agency, the counterintelligence analysts can gain some insight from the civilian law enforcement officers relating to their primary mission of counterintelligence. This insight would come from discussions with the supported law enforcement officers only, not by conducting or assisting in interviews with suspects, or actual law enforcement field operations.

Law Enforcement Support Requirements

Secondary Research Question No. 3: How does law enforcement visualize using military intelligence resources in counterdrug and counterterrorism operations?

By law, military intelligence can support law enforcement with passive measures in counter-narco-terrorism (CNT) and the War on Terrorism (WOT). The military intelligence community has many capabilities that meet the passive measure definition laid out by federal case law to support law enforcement in CNT and the WOT. Law enforcement has definite ideas on how they want to utilize military support, which will be covered next.

James Capra, Special Agent in Charge (SAC) of the Dallas Field Division, Drug Enforcement Administration (DEA), spoke to the Command and General Staff College's Intermediate Level Education class regarding interagency support and ties between drug trafficking and terrorism.²³ After his remarks, SAC Capra agreed to an interview to delve further on the subject of military intelligence support to law enforcement on 31 October 2008.

David Barton, Director of the Midwest HIDTA consented to an interview on 25 November 2008 to get his views on military intelligence support to law enforcement. The

HIDTA program is a federally funded initiative that seeks to coordinate federal, state, local, and tribal law enforcement drug efforts and intelligence sharing by providing coordination, equipment, technology, finances, and intelligence support to combat drug trafficking in areas designated by Congress.²⁴ Director Barton served many years as the chair of the HIDTA intelligence subcommittee, which worked intelligence policy issues relating to the thirty-three HIDTAs around the United States.

Finally, three supervisory special agents with the Kansas City, Missouri, FBI office agreed to be interviewed on the subject of military support to law enforcement. Supervisory Special Agent (SSA) Dean Yannacito is the terrorism group supervisor, and works the Joint Terrorism Task Force in Kansas City. SSA Stephen Bergeman supervises the intelligence group, which provides support to the terrorism and other FBI groups in the Kansas City FBI office. Special Agent (SA) Ben McIntosh supervises the FBI intelligence group assigned to the Midwest HIDTA, which provides general support in conjunction with the Midwest HIDTA to law enforcement agencies in Missouri, Kansas, Iowa, Nebraska, North Dakota and South Dakota.

All supervisors stated military intelligence analysts are the most useful to their respective organizations. Director Barton and the FBI supervisors caveat this with that the analysts need to be at the agency ideally for three years to be useful.²⁵ Director Barton mentioned analyst retention as the largest hindrance to using military analysts effectively, citing National Guard military analysts averaging eighteen to twenty-four months in position, where he would like thirty-six. Director Barton understands the deployment requirements and is not addressing that as a cause for shorter assignments, but the National Guard's desire to move personnel around to other agencies.²⁶ The FBI

supervisors discussed whether it could be done in less time, but SSA Yannacito stated that one year is not worth the effort.²⁷ SAC Capra attributed DEA's success in counterdrug to accurate real-time intelligence and analysis of information, and recognized the military's involvement in that process, specifically the National Guard.²⁸ SAC Capra stated DEA does see relevance to using SIPRNet data, but needed to build a wall around it so it does not enter discovery.²⁹ This describes the reputation that military intelligence analysts in general already have with the interagency, specifically domestic law enforcement. Military intelligence possesses a robust capability to meet this need in domestic counterdrug and counterterrorism operations.

As far as other support the supervisors saw utility in, the answers diverged. SAC Capra thought the Fusion Centers needed to be combined with DoD intelligence systems, since DoD operates in many drug source areas and terrorists safe havens.³⁰ SAC Capra noted that terrorist organizations are in reality part terrorist, part drug traffickers.³¹ SAC Capra gave an example of forty metric tons of cocaine seized in Africa from a drug trafficking group that operates in the same area as a foreign terrorist organization, vying for the same money.³² SAC Capra asserted that most of the time the terrorist and narcotics traffickers join together in alliances mutually beneficial to them, with the result that they are able to garner support and hurt the United States.³³ SAC Capra stated the various intelligence disciplines, such as signals intelligence, human intelligence, and imagery intelligence, provided a wealth of actionable intelligence for his agents to act on, and should be rolled into the domestic fusion centers.³⁴ SAC Capra also desired to see more predictive intelligence analysis in law enforcement to generate more intelligence led operations, but acknowledged that predictive analysis requires a paradigm shift within

law enforcement accustomed to developing historical collaboration of events.³⁵ SSA Bergeman mentioned DoD knowledge of building intelligence reports and analytical link charting, terrorist financing and terrorist organizational structure identification.³⁶ SA McIntosh and SSA Yannacito mentioned linguist support, as FBI is critically short of trained linguists, for case support and summaries related to terrorism around the world.³⁷ Director Barton mentioned ground reconnaissance as a capability that he did not need, due to potential liabilities.³⁸

Director Barton tied training to intelligence analysts, and thought of several types of training beneficial to law enforcement. Director Barton mentioned two types of training as beneficial, that in leadership and intelligence.³⁹ Director Barton mentioned leadership training at all levels from squad level though command, as the military teaches the ability to direct people into harm's way, which would be beneficial to law enforcement.⁴⁰ Director Barton also mentioned the military excelled at theory and strategic and long range planning, which law enforcement needs to improve on, so law enforcement would welcome that type of training. SAC Capra mentioned intelligence planning and intelligence preparation of the environment training as beneficial to his organization.⁴¹ SSA Bergeman thought the FBI would gain from training on the capabilities the military can provide, along with the legal parameters the military needs to operate in.⁴² SA McIntosh echoed this, and stated the National Guard briefing in counterdrug support capabilities assisted them in planning operations. The National Defense Authorization Act of 1989 required DoD to list out capabilities to law enforcement on an annual basis, but this capabilities training does not filter down to the middle managers who have the need to employ DoD support.⁴³

Concerning intelligence type training, Director Barton specifically mentioned target identification as critical, foreign intelligence training, intelligence, surveillance and reconnaissance (ISR) and sensor training, and intelligence programs like ORA.⁴⁴ SA McIntosh desired training on the military intelligence process, as well as exploitation, link charting, graphing, and computer website skills.⁴⁵ SSA Bergeman concurred on analytical training.⁴⁶ SSA Yannacito mentioned GIS mapping, and commodity and financial analysis with associated charting as a need.⁴⁷

Based on the desire for ISR training, the discussions ventured to what military intelligence sensors and capabilities the supervisors thought would be useful to their overall mission. SAC Capra discussed surveillance of approaches to the United States via sea with the ROTH and air with airspace command and control systems, which the military is already doing. SAC Capra would like more land based monitoring of the southwest border area.⁴⁸ Director Barton would embrace UAV, cameras, RAID, and radar, as the Midwest HIDTA is rural and covers the largest land area of any one HIDTA.⁴⁹ SSA Yannacito echoed the requirement for UAV due to the vast open areas within the Kansas City FBI region.⁵⁰ SSA Bergeman also mentioned assets to monitor the border, as the northern border is less patrolled than the southern border in regards to possible terrorist smuggling.⁵¹ SA McIntosh questioned if military communications intercept could be used for triangulation purposes.⁵² Director Barton stated that information collected should be reposed into agency databases, as information collected, processed and analyzed belongs to the agency supported, not the military.⁵³ Director Barton concluded that going with the premise that the law regulates military assets used

in criminal justice, agency rules should apply for use of the assets, consistent with 28 Code of Federal Regulations (CFR), part 23, governing criminal intelligence.⁵⁴

As the conversations discussed terrorism, the issue of access to DoD terrorism data came up. SA McIntosh requested a Standard Operating Procedure document on what the FBI can do with SIPRNet, how to use it effectively, and the best sites to pull data from.⁵⁵ He noted the FBI's biggest problem is knowing what the capabilities of DoD systems are, so they can know how to tie it into their mission.⁵⁶ Director Barton discussed the utility of the relatively new DoD initiative of opening up their classified intelligence database on foreign nationals to law enforcement to use for counterdrug and counterterrorism. Director Barton is not sure of the value to criminal justice, but he admits no one has really attempted to demonstrate that value either.⁵⁷ SSA Yannacito tied intelligence sharing into SIPRNet, stating we all need to do a better job in this.⁵⁸ Director Barton stated that if the military follows 28 CFR, part 23 guiding federal, state and local intelligence sharing, there will be no risk of abuse of independent collection on U.S. persons, as law enforcement also must follow 28 CFR, part 23.⁵⁹ The key is to operate in support of an LEA.

Director Barton further elaborated on the legal issues of military conducting independent collection on U.S. persons. Director Barton stated the same stigma of military collection applies to law enforcement as well, and that law enforcement is sued more than the military is regarding independent collection.⁶⁰ Director Barton cited the Washington–Baltimore HIDTA and Maryland state police collecting information on demonstrators as an example of the law enforcement collection controversy regarding U.S. persons.⁶¹ Director Barton concluded by stating that law enforcement has rules and

language in place; if military follows these rules and can take direction and partnership with law enforcement; it would be a good thing.⁶²

Summary and Conclusions

Military intelligence passive measures can support law enforcement in counterdrug and counterterrorism. The research in this chapter and Chapter 4 bears this out.

The first section in this chapter covered what military intelligence capabilities are available to support law enforcement in counterdrug and counterterrorism operations domestically. This review showed several areas where military intelligence possess capabilities to support law enforcement domestically within the parameters set by statutory and case law. This review looked at personnel skills, military intelligence training, systems and information that law enforcement can potentially use. This also identified several benefits to the military by conducting intelligence support to law enforcement for counterdrug and counterterrorism operations, most notably skills enhancement and liaison with the interagency.

The second section explored how law enforcement visualized using military intelligence capabilities in counterdrug and counterterrorism operations domestically. This sought the opinions from DEA as the lead narcotics enforcement agency, FBI as the lead counterterrorism agency, and the HIDTA program as the bridge from federal to state, local, and tribal law enforcement. This showed that law enforcement has a definite need for intelligence analysts and linguists, as well as intelligence training. Law enforcement desires intelligence systems identified as military intelligence capabilities that can assist them in monitoring activity, utilizing the systems' stand-off range to

enhance operational security, as well as collaboration on information and intelligence sharing with DoD consistent with law.

Now that we have looked at the military intelligence capabilities available to support domestic law enforcement, and ascertained the capabilities that law enforcement desires to assist them in domestic counterdrug and counterterrorism operations, we will in Chapter 6 posit recommendations to employ military intelligence assets in the domestic counterdrug and counterterrorism fight, as well as policy changes to clarify these missions.

¹General David H. Petraeus, U.S. Army, Speech to the Command and General Staff College, Intermediate Level Education Class 09-01, Fort Leavenworth, KS, 22 September 2008.

²9/11 Commission, “*The 9/11 Commission Final Report*,” 107th Congress (2004), 426.

³*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 2001.

⁴*The National Defense Authorization Act of 1989*, Public law 100-456, 100th Cong., 2nd Sess., (29 September 1988), Title XI.

⁵Director of Central Intelligence, *Directive No. 6/4: Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information* (Washington, DC: Government Printing Office, 1998), Annex F.

⁶Office of Management and Budget, *Reciprocal Recognition of Existing Personnel Security Clearances*. (Washington DC: Office of Management and Budget, 17 July 2006).

⁷Department of Defense, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Government Printing Office, 2007), III-12.

⁸*Ibid.*

⁹Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), III-17.

¹⁰*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 1041.

¹¹Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), III-21.

¹²Department of Defense, *DoD Directive 5525.5: Department of Defense Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 1986), 17-19.

¹³*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 5201.

¹⁴Federation of American Scientists. "Remote Battlefield Sensor System." <http://www.fas.org/man/dod-101/sys/land/rembass.htm> (accessed 16 March 2009).

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), III-14.

¹⁹Kathleen M. Carley and Jeff Reminga. "ORA: Organization Risk Analyzer," Center for Computational Analysis of Social and Organizational Systems, http://www.casos.cs.cmu.edu/publications/papers/carley_2004_oraorganizationrisk.pdf (accessed 16 March 2009), 1.

²⁰*Ibid.*

²¹Clear Speed. "Company Awarded \$337M for Homeland Security Data Network." *Cridtoday.com*, 3, no. 17 (26 April 2004), <http://www.gridtoday.com/04/0426/103101> (accessed 9 October 2007).

²²Department of Defense. "*SIPRNet Connectivity for National Guard Units in High Intensity Drug Trafficking Areas*," Robert Newberry (Washington, DC: Memorandum, 24 March 2003).

²³Special Agent In-Charge James L. Capra, Drug Enforcement Administration, Speech to the Command and General Staff College, Intermediate Level Education class 09-01, Fort Leavenworth, KS, 22 September 2008.

²⁴Executive Branch. "High Intensity Drug Trafficking Program." Office of National Drug Control Policy. <http://www.whitehousedrugpolicy.gov/HIDTA/> (accessed 17 March 2009).

²⁵David Barton, interview by author, Kansas City, MO, 25 November 2008. See also Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

²⁶David Barton, interview by author, Kansas City, MO, 25 November 2008.

²⁷Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

²⁸Special Agent In-Charge James L. Capra, Drug Enforcement Administration, Speech to the Command and General Staff College, Intermediate Level Education class 09-01, Fort Leavenworth, KS, 22 September 2008.

²⁹*Ibid.*, Discovery in the context SAC Capra used equates to what information the defense attorney is authorized to look at. Since most defense attorneys do not possess security clearances, they would be unable to view the SIPRNet data, which would likely result in the SIPRNet data being suppressed from the prosecution's case. An option to use SIPRNet data is to cause the law enforcement to independently come up with the same information in a way that allows the law enforcement information to be admitted into discovery, in which case the SIPRNet information is treated as an intelligence file, not subject to discovery.

³⁰James L. Capra, interview by the author, Fort Leavenworth, KS, 31 October 2008.

³¹*Ibid.*

³²*Ibid.*

³³*Ibid.*

³⁴*Ibid.*

³⁵*Ibid.*

³⁶Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

³⁷*Ibid.*

³⁸David Barton, interview by author, Kansas City, MO, 25 November 2008.

³⁹*Ibid.*

⁴⁰*Ibid.*

⁴¹James L. Capra, interview by the author, Fort Leavenworth, KS, 31 October 2008.

⁴²Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

⁴³*The National Defense Authorization Act of 1989*, Public law 100-456, 100th Cong., 2nd Sess., (29 September 1988), Title XI.

⁴⁴David Barton, interview by author, Kansas City, MO, 25 November 2008.

⁴⁵Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸James L. Capra, interview by the author, Fort Leavenworth, KS, 31 October 2008.

⁴⁹David Barton, interview by author, Kansas City, MO, 25 November 2008.

⁵⁰Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

⁵¹*Ibid.*

⁵²*Ibid.*

⁵³David Barton, interview by author, Kansas City, MO, 25 November 2008.

⁵⁴*Ibid.*

⁵⁵Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

⁵⁶*Ibid.*

⁵⁷David Barton, interview by author, Kansas City, MO, 25 November 2008.

⁵⁸Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

⁵⁹David Barton, interview by author, Kansas City, MO, 25 November 2008.

⁶⁰*Ibid.*

⁶¹Ibid.

⁶²Ibid.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

Military intelligence can provide passive support in a Title 10 status utilizing many areas of its capability to support law enforcement and the interagency in counterdrug and counterterrorism operations within the United States. The research in this paper supports this position. The National Defense Strategy called on the Department of Defense (DoD) to protect the Homeland from attack and provide interagency support in response to natural or man-made disasters.¹ The Intelligence Reform and Surveillance Act of 2004 required all intelligence components to support each other in counterterrorism.² Additionally, the U.S. Department of State asserted that eighteen of forty-one terrorist organizations around the world derive a substantial portion of their support from drug trafficking.³ This results in terrorism and drug trafficking being closely linked.

Chapter 6 is organized as follows:

Summary of findings in Chapters 4 and 5

Interpretation of findings described in Chapters 4 and 5

Recommendations

Summary and Conclusion

Summary of findings in Chapters 4 and 5

Chapter 4 showed that there is no statutory or case law proscription of military intelligence support to law enforcement in counterdrug and counterterrorism operations. However the terrorism support authorization is not as clear as the counterdrug support authorization. The prohibitions come from regulatory guidance, which have not been

updated in over twenty years, even though Congress passed several laws loosening the legal restrictions of the 1970s.

Chapter 5 showed that the military intelligence community possesses several ways in which it can provide passive support law enforcement in counterdrug and counterterrorism. The military intelligence community can provide trained intelligence analysts and linguists to enhance the capacity of federal agencies with a counterdrug or counterterrorism mission, who already possess clearances the agencies require. These personnel can not only process intelligence, but develop collection plans for the supported law enforcement agencies (LEA) to execute, along with other planning and training on planning as well.⁴ The military intelligence community possesses several systems that law enforcement can use to include unmanned aerial vehicles (UAV), remote sensor systems, radar, analytical programs and the Secure Internet Protocol Router Network (SIPRNet), all of which are justified by law or DoD memoranda.⁵ This support can benefit the military by complying with federal law regarding interagency support, building networks military personnel can use while deployed overseas, maintenance of perishable counterinsurgency intelligence skills, realistic linguist training when not deployed, realistic UAV training, and early warning of potential threats to military facilities or personnel.

Also in Chapter 5, law enforcement provided their views on how they envision employing military intelligence capabilities in their overall counterdrug and counterterrorism strategies. The foremost area they desire help in is intelligence analysis support, and agreed the analysts need to be at the supported agency for three years to be fully utilized.⁶ Along with intelligence analysis, the LEA supervisors desired help with

analytical reports and link charting, along with linguist support.⁷ All desired training in intelligence planning, collection planning, and intelligence preparation of the operational environment; however the supervisors expressed diverging opinions on different types of intelligence training from these mentioned.⁸ All supervisors agreed Intelligence, Reconnaissance and Surveillance systems are needed to assist them in their operations, and that information collected should be retained by law enforcement, not the military.⁹ Concerning military information on SIPRNet, most of the supervisors desired to know what was on it before making a judgment as to its usefulness in their agency's operation, but stated the concept of accessing the information was valid.¹⁰

Interpretations of Findings described in Chapters 4 and 5

The results of the research showed that military intelligence can support domestic law enforcement in statute. Case law defined parameters of this support, limiting it to passive measures, which cover the vast majority of military intelligence capabilities other than counterintelligence agent support. DoD policy, directives, and regulations concerning intelligence and domestic support to law enforcement have not been updated to reflect current statutes and presidential executive orders in many cases for over twenty-five years.

As far as support capabilities that the military intelligence community has to offer to law enforcement, law enforcement supervisors desired to use them and saw the intelligence capabilities as multipliers in law enforcement's efforts to reduce the drug and terrorism threats. Law enforcement views 28 Code of Federal Regulations (CFR), part 23 as protecting both law enforcement and the military from overreaching the legal boundaries on intelligence collection, processing and dissemination.

The implications of these findings is that DoD has tremendous capabilities to assist in reducing the risk of another 9/11 type terrorist attack within the United states. In addition, with eighty percent of the nation's intelligence capability, it is economically prudent to leverage this capability to support the interagency, as Joint doctrine called for.

Three things came as a surprise in bearing on the thesis. First was the amount of discussion the founding fathers had regarding the use of troops domestically, and then they still reached the conclusion that it was in the nation's best interest to do so in certain cases outlined by Congressional law. Second, the case law regarding military support defined the passive measures allowed for domestic law enforcement support and active measures proscribed from support. Third, the fact that DoD did not update regulations governing intelligence to match law and executive orders, as demonstrated by current versions of intelligence regulations that have publication dates in the early 1980s.

Recommendations

Secondary Research Question No. 4: What, if any, changes to law and/or DoD policy are needed to support law enforcement in counterdrug and counterterrorism operations?

1. DoD seek congressional plain language for the counterterrorism mission similar to the congressional counterdrug mission, as laid out in the National Defense Authorization Act of 1989. While there is enough language among various laws to piece this mission authorization together, this language would remove the ambiguity around the subject to address the strategic communications aspect of the military conducting the counterterrorism mission domestically.

2. The DOD Directive 5240.1 and 5525.5 along with DoD Regulation 5240.1-R and AR 381-10 be updated to reflect current law and Executive Order guidance regarding intelligence functions as part of the interagency and support to counterdrug and counterterrorism operations. Incorporate restrictions from National Guard regulation (NGR) 500-2 into Army regulation (AR) 381-10 governing how military intelligence can support domestic law enforcement in a Title-10 status, and make it applicable to both the counterdrug and counterterrorism missions. Finally, align directives and regulations that currently contradict current published doctrine for homeland security and counterdrug operations.

3. Update DoD directives to allow military intelligence to conduct concealed monitoring outside of DoD installations consistent with federal law, as long as the military is operating in direct support of law enforcement for counterdrug, illegal immigration, or counterterrorism operations. Mission areas this would apply to include along the borders to identify when traffickers are crossing the border and at suspected drug growing or processing sites within the United States where there is no reasonable expectation of privacy as defined in the court decision in *Oliver v. United States*.¹¹ This involves use of UAV and remotely monitored ground sensors. These systems would be used where no reasonable expectation of privacy exists, which is where a reasonable person is entitled to believe his or her actions are not subject to monitoring by electronic, optical or mechanical devices.¹² Utilizing concealed monitoring equipment on smuggling and trafficking routes also conforms to the Intelligence Reform and Surveillance Act of 2004, where it calls for monitoring along the borders using UAV and electronic sensors.¹³ NGR 500-2 provides good language to update Procedure Six by addressing

area verses person and requiring a law enforcement officer to be present or in direct contact with the military unit performing the mission.¹⁴

4. Allow—or provide the ability for military intelligence to provide intelligence analysis support. The military has built analytical capacity to deal with the counterinsurgency environment, which includes acts of terrorism targeting the local populace as well as military forces. Military intelligence analysts should augment and reinforce the civilian intelligence community, as it is a ready capability with appropriate clearances to do the job immediately.¹⁵ This is in addition to the counterdrug support to the interagency authorized by the National Defense Authorization Act of 1989.¹⁶ This also includes the responsibility to package a product in a form usable to the supported agency; and in the agency’s report format. AR 381-10 does provide for this, but DoD level regulations still have heavy restrictions on this or do not allow for it.¹⁷

5. Ensure that military intelligence personnel process Procedure Two information, to include open source analysis, gathered from the law enforcement approved collection plan at the supported LEA, which means the LEA owns the information and governs the dissemination rules. This also assists law enforcement with fulfilling the requirement listed in the Intelligence Reform Act of 2004 and draws the military’s expertise in doing this in combat environments the past several decades.¹⁸ The database and law enforcement sources for military intelligence analysts to check meet the intent of “least intrusive means” outlined in DoD Directive 5240.1.¹⁹ If the military intelligence analyst identifies information of concern to the military, most LEAs will allow the analyst to share that information with the military. The specifics of sharing LEA information with the military should be worked out in a Memorandum of Understanding with the LEA

before support is provided and done according to law. NGR 500-2 stated that the LEA is responsible for setting dissemination rules, to include public affairs and press releases, and serves as a guideline for DoD policy clarification where needed on the subject.²⁰

6. Military intelligence should use its collection planning expertise to assist law enforcement in collection planning to meet their investigatory requirements, as well as the joint requirements in counterterrorism and counterdrug operations. In the context of the DoD Regulation 5240.1-R the intelligence personnel should develop the collection plan in support of law enforcement, and law enforcement needs to be the signatory authority for the collection plan. In this way law enforcement still owns the plan, and directs the military intelligence element supporting the agency to answering the collection plan requirements, using passive measures as defined in *United States v. Red Feather* to assist law enforcement in satisfying those requirements.²¹ These measures include publicly available information, aerial and ground reconnaissance assets, agency databases, and supported agency means after the agency obtains the valid legal process to build the intelligence picture and prepare for agency dissemination.²² This model fits with what Joint Publication 3-07.4 calls for in counterdrug operations.²³ Even Executive Order 12333 allowed the intelligence community to participate in law enforcement investigations of international terrorists and narcotics activities.²⁴ Per DoD Directive 5525.5, conducting this support at the LEA keeps the military member out of a potential law enforcement function, and also ensures that the LEA owns and retains the information, not the military.²⁵

7. Military intelligence should assist law enforcement in developing and synchronizing the collection effort across the interagency to maximize limited resources

and support situational awareness. This includes medical intelligence in view of the bio-terrorism threat, plus provides the additional effect of preparing for a non-terrorist pandemic health crisis. Utilizing military intelligence capabilities to support law enforcement can provide a fresh look to recommend to law enforcement information to share with other agencies. This support will help minimize intelligence gaps across the interagency, thereby reducing the likelihood of another 9/11 terrorist type event.

8. Allow the military intelligence community to provide linguist support to law enforcement in counterdrug and counterterrorism functions. Again, supporting the interagency with linguists will assist in the unity of effort to ensure the United States government is massing its national power to defeat these organizations. This support assists the unity of effort by leveraging existing capabilities in DoD to support law enforcement, and also may key DoD linguists to recommend that law enforcement look in DoD databases for information related to what the linguists translated.²⁶ Military intelligence should use its linguist ability to support law enforcement needs for translation as listed in JP 3-07.4, Joint Counterdrug Operations, which stated linguist services as a valid mission for counterdrug support to law enforcement. This is something the military intelligence can do in the course of training under the Economy Act.²⁷ In accordance with the Deputy Assistant Secretary of Defense for Counter-narcotics memorandum, this support extends to counterterrorism operations as well.²⁸ Military intelligence linguists can staff translation centers for the various federal law enforcement agencies as part of the overall intelligence community, as a cost saving measure over hiring civilian linguists. This also affords military linguists the ability to keep their language skills current when not deployed.

9. Directional surveillance to find pinpoint location, using the direction finding capabilities of the electronic equipment can be done with a plain reading of this DoD Regulation 5240.1-R. Signals collection equipment used in the military is designed to identify location, in addition to what is being transmitted. Turning off the auditory part of the system and merely utilizing the direction finding aspects is a passive measure that would help identify the targets location for law enforcement. Law enforcement can obtain through legal process the frequency of a communication device a suspected trafficker or terrorist operates on, and the authorization to track that device's signal. This entails no listening to the communication, only the location, so it should be legal by law.

10. The Organization Risk Analyzer (ORA) software should be used by law enforcement to help identify key figures in drug or terrorist organizations for law enforcement to focus its investigations on. ORA can be downloaded from a website for use on any agency computer. Military intelligence analysts with experience on this program can set it up for a LEA and train them on how to upload their data into the program to identify missing links.

11. The Secure Internet Protocol Router Network (SIPRNet) is both a system and a source of information that law enforcement can utilize in both counterdrug and counterterrorism. Law enforcement can and should use data collected by military personnel in operations around the world to identify key individuals in narcotics and terrorist organizations, and use that information to guide them to find collaborating unclassified information for use in court. This support is authorized by the Deputy Assistant Secretary of Defense for Counternarcotics for both counterdrug and counterterrorism for the National Guard, and should be expanded to include the active

components as well, since there are no legal proscriptions against active duty personnel performing this mission.

12. The military and law enforcement need to expand sharing of intelligence information regarding terrorism, drug smuggling, and alien trafficking, the latter being integral to both terrorism and narcotics. As long as protocols are in place to ensure the safeguards to civil liberty, the same logic the 9/11 Commission used to share intelligence with private companies and foreign governments should allow military intelligence to support civilian law enforcement. The governing regulation for civilian intelligence is 28 CFR, part 23; Director Dave Barton of the Midwest High Intensity Drug Trafficking Area (HIDTA) and former chair of the HIDTA Intelligence Committee made the observations that if the military personnel followed this like the law enforcement personnel, no issues would result.²⁹ Implementing this system would break the intelligence community out of the Cold War paradigm, as the Commission envisioned.³⁰

13. Military personnel should have assignments at the interagency to foster relationships, planning, and intelligence and information exchange. Joint Publication 3-08 Counterdrug Operations and Joint Publication 3-27 advocate this approach, and the Intelligence Reform Act of 2004 strongly recommended it to DoD.³¹

14. This thesis did not address two areas which warrant further study and are relevant to the topic:

First, this thesis did not address what the Judge Advocate General (JAG) Corps is teaching in regards to intelligence law and the legal basis for domestic support. This JAG instruction needs to be compared to the legal basis of this research to identify any gaps in

instruction, to ensure JAG lawyers the broad basis to recommend support options to the supported commander.

Second, this thesis did not examine who other countries utilize their military intelligence organizations to support either counterdrug or counterterrorism missions. Other countries may have already addressed issues American society faced, or may not have addressed them and caused friction within their societies that the U.S. military can learn from.

Summary and Conclusion

Military Intelligence can conduct passive activities to support law enforcement in counterdrug and counterterrorism operations. Intelligence support can identify the drug traffickers' and the terrorists' coherence, vulnerabilities, and patterns to allow law enforcement to remove the organizations' power. Intelligence resources can cover important cross border smuggling routes not easily accessible to law enforcement as an economy of effort, and help identify alternate routes once law enforcement interdicts the primary ones. Intelligence support to counterdrug operations can assist in identifying funding streams, patterns, and modus operandi to allow law enforcement to interdict and remove the financial support, both at home and abroad. Intelligence can assist in identifying drug or terrorist organization patterns and future operations, allowing law enforcement to interdict globally, and military to interdict outside the United States. Standard operating procedures can serve as a standing collection plan, allowing military intelligence analysts supporting law enforcement and intelligence centers the freedom to check databases and law enforcement sources at hand quickly, especially when time is critical. From a defensive homeland defense operations standpoint, intelligence support

can assist in evaluating security and force protection tasks, and identify critical infrastructure to protect. Law enforcement desires to have assistance in these areas from the military, as law enforcement recognizes the military has more experience in the areas mentioned. The main hindrances to the military intelligence component offering this type of support is regulatory, as statute and case law authorize and affirm this support domestically. DoD and the Department of the Army need to update the intelligence and domestic support regulations to reflect current legislation, executive guidance, and doctrine, in order to afford better support to the interagency.

Military intelligence support to the interagency fits well within the framework outlined in Joint Publication (JP) 3–27, Homeland Defense, as military intelligence possesses provide critical capacity where the other federal agencies lack intelligence capacity.³² This support also fits well in the statement within JP 3–27, Joint Counterdrug Operations, where it stated “our approach to homeland defense must address all aspects of the operational environment.”³³ As JP 3-27 called for an active layered defense, DoD needs to address the illegal alien, drug trafficking, and terrorism threats in this active layered defense both within and outside the United States. Military intelligence needs to support law enforcement in counter-terrorism, using the counterdrug paradigm as a proven model. Since military intelligence components legally can support law enforcement within the United States, it behooves DoD to use this capability to prevent terrorist attacks within the homeland verses react to them.

¹Department of Defense, National Defense Strategy” (Washington, DC: Government Printing Office, 2008), 7.

²*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 1016 and 1021.

³Drug Enforcement Administration (DEA)–El Paso Intelligence Center (EPIC), briefing, Midwest High Intensity Drug Trafficking Area- Domestic Highway Enforcement Regional Coordination Committee, 2 October 2008.

⁴Department of Defense, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Government Printing Office, 2007), III-12

⁵*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 5201. See also Newberry, Robert. “SIPRNet Connectivity for National Guard Units in High Intensity Drug Trafficking Areas,” Department of Defense. Washington, DC: Memorandum, 24 March 2003.

⁶David Barton, interview by author, Kansas City, MO, 25 November 2008. See also Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

⁷*Ibid.*, See also James L. Capra, interview by the author, Fort Leavenworth, KS, 31 October 2008.

⁸David Barton, interview by author, Kansas City, MO, 25 November 2008. See also Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008. See also James L. Capra, interview by the author, Fort Leavenworth, KS, 31 October 2008.

⁹*Ibid.*

¹⁰David Barton, interview by author, Kansas City, MO, 25 November 2008. See also Dean Yannacito, Stephen Bergeman, and Ben McIntosh, interview by author, Kansas City, MO, 17 December 2008.

¹¹*Oliver v. United States*, 466 U.S. 170 (1984).

¹²Department of Defense, *DoD Regulation 5240.1-R: Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Washington, DC: Government Printing Office, 1982), 39.

¹³*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 5201.

¹⁴National Guard Bureau, *NGR 500-2: National Guard Counterdrug Support* (Washington, DC: Government Printing Office, 2000), 13.

¹⁵*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 2001.

¹⁶*The National Defense Authorization Act of 1989*, Public law 100-456, 100th Cong., 2nd Sess., (29 September 1988), Title XI.

¹⁷Department of the Army, AR 381-10: *U.S. Army Intelligence Activities* (Washington, DC: Government Printing Office, 2007), 20.

¹⁸*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 1052.

¹⁹Department of Defense, *DoD Directive 5240.1: Department of Defense Intelligence Activities* (Washington, DC: Government Printing Office, 1988), 4.

²⁰National Guard Bureau, NGR 500-2: *National Guard Counterdrug Support* (Washington, DC: Government Printing Office, 2000), 20-23.

²¹United States v. Red Feather, 392 F.Supp. 916 (D.C.S.D. 1975).

²²United States v. Red Feather, 392 F.Supp. 916 (D.C.S.D. 1975).

²³Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), III-17.

²⁴Executive Order no. 12333, Federal Register 73, (4 August 2008), Part 2.6.

²⁵Department of Defense, DoD Directive 5525.5: *Department of Defense Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 1986), 17.

²⁶Robert J. Newberry, “Secure Internet Protocol Router Network (SIPRNet) Connectivity for National Guard Units in High Intensity drug trafficking Areas (HIDTA),” (Memorandum, Deputy Secretary of Defense–Counternarcotics, Washington, DC, March 2003).

²⁷Department of Defense, Joint Publication 3-07.4 *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 2007), I-5-6.

²⁸S. England, “Secure Use of Counternarcotics Funds for Counterterrorism,” (Memorandum, Deputy Secretary of Defense – Counternarcotics, Washington, DC, April 2006).

²⁹David Barton, interview by author, Kansas City, MO, 25 November 2008.

³⁰*Ibid.*, 417.

³¹*Intelligence Reform Act of 2004*, Public Law 108-458, 108th Cong., 2nd Sess. (17 December 2004), § 1041.

³² The 9/11 Commission Final Report recommended that the interagency share intelligence resources. As eighty percent of those intelligence resources reside within DoD, the military is the likely body to support the interagency to identify terrorist threats,

perform critical infrastructure analysis, and conduct vulnerability assessments of critical infrastructure.

³³Department of Defense, Joint Publication 3-27, *Homeland Defense* (Washington, DC: Government Printing Office, 2007), I-3.

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