U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR JO ANN HARRIS
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

From: Walter Dellinger
Assistant Attorney General

Re: Use of Military Personnel for Monitoring Electronic Surveillance

This responds to your request for our opinion as to the legality of using United States Armed Forces personnel to assist federal law enforcement officers by monitoring electronic surveillance authorized pursuant to the Electronic Communications Privacy Act of 1986 (ECPA). You have also asked whether additional legislation is necessary, or at least desirable, to clarify whether Congress intended the term "government personnel" (as used to describe those authorized to assist in electronic surveillance under ECPA) to encompass military personnel.

We conclude that military personnel are presently authorized to perform such monitoring operations under a proper reading of the pertinent statutes. Although clarifying legislation on this issue could be considered desirable in the sense that it always is when a statute's interpretation is not entirely free from doubt, we do not believe that such legislation is necessary in this instance.

I. BACKGROUND

The Posse Comitatus Act (PCA) was enacted after the Civil War in order to prohibit U.S. Army personnel from undertaking civilian law enforcement activities (in particular, policing the conduct of elections) in Southern States during the Reconstruction Era. It presently bars the employment of Army or Air Force personnel "as a posse comitatus or otherwise to execute the law." 18 U.S.C. § 1385. Its restrictions on the involvement of military personnel in civilian law enforcement activity do not apply to Navy or Marine Corps personnel.

In 1981 (with amendments added in 1988 and 1989), Congress enacted chapter 18 of Title 10, United States Code, 10 U.S.C. §§ 371-378 ("chapter 18"), which authorizes DOD to provide various forms of assistance to civilian law enforcement agencies. The purpose of chapter 18's provisions, which were expanded in 1988 with particular reference to efforts to combat illegal drugs, is "to expand the opportunities for military assistance in a manner that is consistent with the requirements of military readiness and the historic relationship between the armed forces and civilian law enforcement activities." H.R. Conf. Rep. No. 100-989, 100th Cong., 1st Sess. 450, reprinted in 1988 U.S.C.C.A.N. 2503, 2578. Section 375 of chapter 18 required the Secretary of Defense to prescribe "such regulations as may be necessary" to bar certain forms of direct involvement by military personnel[1] ("search, seizure, arrest, or other similar activity") in civilian law enforcement, but section 378 goes on to provide that nothing in chapter 18 may be construed to impose limits on such involvement beyond those that existed prior to 1981 (i.e., the limits imposed by the PCA). 10 U.S.C. §§ 375, 378.

ECPA was enacted in 1986 to amend title III of the Omnibus Crime Control and Safe Streets Act (the federal wiretap law). Its broad purpose was to update and clarify laws regulating the interception of electronic communications in light of major changes in computer and telecommunications technologies. Insofar as relevant here, ECPA provides that duly authorized electronic surveillance operations may be conducted by "government personnel" as a general category as long as such personnel are acting under the supervision of federal law enforcement officers (e.g., an FBI agent) authorized to conduct such operations. 18 U.S.C. § 2518(5).

Against this statutory background, you have asked for our opinion whether military personnel may legally assist authorized federal law enforcement personnel in executing electronic surveillance orders authorized by ECPA. This issue has been brought forward by the need for military personnel with foreign language abilities to assist FBI and other law enforcement personnel in monitoring court-authorized interceptions of communications (e.g., communications among Asian drug organizations). We understand your inquiry to be limited to the question of whether military personnel may serve as contemporaneous monitors of electronic surveillance transmissions, as distinct from such activities as "planting" the surveillance equipment at the targeted location or carrying a concealed recording device while acting as an undercover agent.

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[1] Unlike the PCA, chapter 18 of title 10 applies to the law enforcement activities of Navy and Marine Corps personnel as well as Army and Air Force. 10 U.S.C. § 375.

II. ANALYSIS

Resolution of the question presented turns upon sequential application of the three statutes described above:

If ECPA itself clearly authorizes the activity at issue, neither the PCA nor section 375 of chapter 18 would present an obstacle to the legality of that activity. Both of the latter statutes expressly provide that their restrictions do not apply if the activities in question are otherwise authorized by law.

Conversely, if it were determined that ECPA was intended to exclude military personnel from the electronic surveillance activity in question, that also would foreclose the matter. ECPA's very specific provisions -- addressed to the detailed regulation of electronic surveillance activity in particular -- would prevail over the more general provisions of the PCA and chapter 18 of title 10.

Finally, if ECPA standing alone is inconclusive on the issue -- which we determine to be the case, although the sounder interpretation is that ECPA would authorize the military participation at issue -- section 375 and the PCA must be consulted. For reasons explained in parts II.B and C, below, we conclude that neither of those statutes prohibit the proposed monitoring activity at issue.

A. ECPA

The particular provision in question here, 18 U.S.C. § 2518(5), was enacted as section 106(c) of ECPA, Pub. L. 99-508, 100 Stat. 1848 (1986). It provides as follows:

> An interception under this chapter may be conducted in whole or in part by government personnel, or by an individual operating under contract with the government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(Emphasis added.)

The underlying legislative history provides no helpful guidance as to the intended scope of the term "government personnel." The section-by-section analysis of the Senate Report contains only a general explanation of the measure:

> [The] monitoring of interceptions under this chapter may be conducted in whole or in part by Government personnel, or by individuals operating under contract with the Government, as long as such personnel are acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

S. Rep. No. 541, 99th Cong., 2d Sess. p. 31 (1986), 1986 U.S.C.C.A.N. 3555, 3585.

The Report also shows that the provision was included in the legislation at the request of the FBI in order to relieve agents from devoting inordinate amounts of time to routine wiretap monitoring assignments. Id. But there is nothing to indicate whether Congress intended military personnel to be included among the government personnel referred to in the statute.

We have therefore examined other federal statutes using the term "government personnel" to determine whether the predominant usage indicates a tendency to encompass military personnel. If it does, and since ECPA itself does not provide more specific evidence of intent on the issue, there is a reasonable basis for concluding that the same inclusive effect was intended in the pertinent provision of ECPA.

Of some 45 relevant usages of the term "government personnel" in the U.S. Code identified by computer search, only one statute was identified that arguably uses it in a manner excluding, or at least distinguishing, military personnel.[2] In contrast, numerous statutes were identified where the term was used with the demonstrated or highly probable intent of encompassing military personnel.[3] Other statutes identified were unclear or

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[2] See 10 U.S.C. § 2462, governing certain DOD procurement functions, which provides that "the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel) . . . ." (emphasis added). This usage suggests that, at least in drafting this particular statute, Congress viewed "military personnel" and "Government personnel" as distinct categories, although the usage is not necessarily incompatible with the view that the broader term "Government personnel" may also encompass the narrower term "military personnel."

[3] E.g., 10 U.S.C. § 2468(b)(1) (military base commanders required to "prepare an inventory for [the] fiscal year of commercial activities carried out by Government personnel on the military installation"; context and legislative history indicate term includes military personnel); 19 U.S.C. § 2492(b)(1)(A), 22 U.S.C. §§ 283s, 284k, 285p, and 2291(a)(2)(A)(i)(II) (imposing requirements on foreign governments, as condition of receiving certain aid or trade concessions, to certify that they have taken measures to prevent the sale of illegal drugs in their countries to "United States government personnel or their dependents"; legislative context strongly indicates term meant to include military personnel); 22 U.S.C. § 2699(a) (Secretary of State required to seek agreements that will "expand employment opportunities for family members of United States government personnel assigned abroad"; legislative history demonstrates that the term encompasses military personnel. see

ambiguous as to their inclusive intent in using the term. In the main, however, our research indicates that the use of the term "government personnel" in federal statutes generally appears to contemplate inclusion of military personnel.

Perhaps the most relevant of these provisions -- in that it also deals with extending access to sensitive federal law enforcement matters -- is Rule 6(e)(2)(A) of the Federal Rules of Criminal Procedure. That rule provides for the disclosure of otherwise confidential grand jury materials to "government personnel" under the following circumstances:

> (A) Disclosure otherwise prohibited by this rule of matters occurring before a grand jury . . . may be made to -- . . . . (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

Id. The Notes of the Advisory Committee on Rules accompanying the 1977 amendment that incorporated the above-quoted language state that, "The phrase 'other government personnel' includes, but is not limited to, employees of administrative agencies and government departments." This explanation indicates a generally inclusive intent and is arguably broad enough to encompass military personnel, who are, in fact, employees of the Department of Defense. At least one thorough judicial analysis of Rule 6(e)'s legislative history also indicates that it's reference to "government personnel" was understood to encompass military personnel.[4]

H.R. Rep. No. 95-1160, 95th Cong., 2d Sess. 50, 1979 U.S.C.C.A.N. 2424, 2491); 31 U.S.C. § 3525(a)(1) (re auditing of operations authorized "to sell goods or services to United States Government personnel and their dependents"; legislative history demonstrates that term includes military personnel); 46 App. U.S.C. § 1241(c) ("privately owned American shipping services may be utilized for the transportation of motor vehicles owned by Government personnel"; legislative history demonstrates that term includes military personnel).

[4] See United States v. Tager, 506 F. Supp. 707, 717 (D. Kan. 1979), where the court's review of the legislative history underlying Rule 6(e)'s use of the term "government personnel" included the following:

> Even critics of the amendment, who disapproved of the expanded parameters of permissible disclosure, recognized that potential disclosures contemplated by the new language reached only governmental employees -- from members of Congress to employees of O.E.O. or the military services. Hearings on Proposed Amendments, supra, at 147, 229 (statements of Bernard Nussbaum, Esq. and Prof. Melvin Lewis).

Id. (emphasis added). See also Hearings on H.R. 5864 before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong. 1st Sess. (1977).

In sum, the legislative history of ECPA itself is uninstructive as to whether Congress's use of the term "government personnel" in 18 U.S.C. § 2518(5) was intended to encompass military personnel. However, review of other federal statutes (and one Federal Rule of Criminal Procedure) using the term indicates that Congress generally employs it in a manner intended to encompass military personnel. Absent some strongly countervailing indication of congressional intent, therefore, ECPA's reference to "government personnel" should also be construed to include military personnel. However, since Congress evidently did not address or consider the particular role of military personnel in electronic surveillance operations when it enacted ECPA, a specific intent to override other legal restrictions (if any) on military participation in civilian wiretapping activity cannot be inferred. We therefore examine whether such activity would otherwise be prohibited under chapter 18 or under the PCA.

B. Chapter 18 and 10 U.S.C. § 375

As noted above, in 1981 Congress enacted chapter 18 of title 10, U. S. Code, in order to expand the opportunities for military personnel to assist civilian law enforcement agencies. Authorized military law enforcement activities were again expanded in 1988 when Congress enacted a series of amendments "to enhance the ability of the Department of Defense to provide support to the drug enforcement efforts of civilian agencies." H.R. Conf. Rep. No. 989, 100th Cong., 1st Sess. 450 (1988), reprinted in, 1988 U.S.C.C.A.N. 2503, 2577-78.

Following the sections of chapter 18 that authorize the various categories of military law enforcement assistance, see 10 U.S.C. §§ 371-74, section 375 qualifies those grants of authority by providing:

> The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest or other similar activity unless participation in such activity by such member is otherwise authorized by law.

In 1982, the Secretary of Defense promulgated regulations as required by section 375. They provided in pertinent part as follows:

> Except as otherwise provided in this enclosure, the prohibition on use of military personnel "as a posse comitatus or otherwise to execute the laws" prohibits the following forms of direct assistance:
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> (i) Interdiction of a vehicle, vessel, aircraft or other similar activity.
> (ii) A search or seizure.
> (iii) An arrest, stop and frisk, or similar activity.
> (iv) Use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators.

32 C.F.R. § 213.10(a)(3)(1992). Although these regulations have since been removed from the Code of Federal Regulations[5], their purported application to a "search or seizure" or to "surveillance . . . of individuals" raises the question of whether the monitoring of electronic surveillance at issue here would be prohibited under section 375 or the PCA.

Section 375 is part of a revised version of chapter 18, the purpose of which was described in these terms in the 1988 Conference Report:

> This revision is intended to expand the opportunities for military assistance in a manner that is consistent with the requirements of military readiness and the historic relationship between the armed forces and civilian law enforcement activities.

Conf. Rep. at 450, 1988 U.S.C.C.A.N. at 2578 (emphasis added). As this Office recently concluded in an opinion on a similar issue concerning section 375, the provisions of chapter 18 were designed to preserve that "historic relationship" by preventing the "direct, physical confrontation between military personnel and civilians." 15 Op. O.L.C. 44, 54-55 (1991) ("1991 opinion") (emphasis added).

Here, the question is whether section 375's prohibition of military participation in "searches" or "similar activity" would apply to military participation in monitoring civilian wiretaps authorized by courts under ECPA. This Office has opined that this prohibition was

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[5] The Part 213 regulations were removed from the Code of Federal Regulations (CFR) by the Defense Department on April 28, 1993, with the cryptic statement that they "have served the purpose for which they were intended and are no longer valid." 58 Fed. Reg. 25,776 (1993). Before those regulations were removed, this Office had opined that their prohibition of military participation in searches was properly limited to searches that entail physical or personal contact with civilian subjects See 15 Op. O.L.C. 48-59.

intended to encompass, at most, "only searches involving physical contact with civilians or their property, and perhaps only searches involving physical contact that are likely to result in a direct confrontation between military personnel and civilians." 1991 opinion at 44, 49, 59.[6] As the 1991 opinion explained, the enactment of section 375 reflected Congress's intent to codify the "passive-active participation" distinction recognized in the case of United States v. Red Feather, 392 F. Supp. 916, 924-25 (D.S.D. 1975) -- i.e., that the PCA prohibits only "active" military involvements entailing direct physical contact with civilians. 1991 Opinion at 53-55.[7]

The validity of this position is underscored by the Conference Report underlying the 1988 amendments to Section 375. Those amendments deleted the phrase "interdiction of a vessel or aircraft" from the listing of law enforcement activities foreclosed to military personnel under the original version of Section 375. The Conference Report explains that the change was made because the term "'interdiction' has acquired a meaning that includes detection and monitoring as well as physical interference with the movement of a vessel or aircraft." Conf. Rep. at 452, 1988 U.S.C.C.A.N. at 2580.[8] Because Congress recognized that interdiction of vessels and aircraft included non-confrontational monitoring activity, such activity was removed from the coverage of Section 375. This confirms that Section 375's restrictions are aimed at activities entailing direct contact or confrontation with civilian subjects, as opposed to "passive" forms of law enforcement assistance such as remote monitoring through various forms of electronic surveillance.

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[6] The same opinion concluded that, based on the language, structure, and legislative history of section 375, its use of the term "search" was not intended to be coextensive with the meaning of that same term as used in the Fourth Amendment. 15 Op. O.L.C. at 49.

[7] It should also be noted that section 375's prohibition against military participation in a "search" or "similar activity" is itself restricted by 10 U.S.C. § 378, which provides, "Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981." This makes clear that if military assistance in electronic surveillance activities had not been prohibited by the PCA, then section 375 does not independently prohibit such activity.

[8] In discussing other forms of military law enforcement activity authorized by the 1988 amendments, the Conference Report further stated:

> To the extent that transportation of law enforcement officials or use of military officials does not reasonably raise the possibility of a law enforcement confrontation, such assistance may be provided in the United States under subsection (c).

Id. at 452, 1988 U.S.C.C.A.N. at 2580 (emphasis added). This language further demonstrates that the congressional concern underlying the restrictive provisions of chapter 18 and Section 375 was direct, physical contact or confrontation with civilian subjects.

The court-authorized ECPA monitoring activity at issue here would not involve physical contact with civilians or their property, let alone "direct confrontation between military personnel and civilians."[9] Therefore, we do not believe that the use of military personnel to perform such monitoring would violate the provisions of 10 U.S.C. § 375.

C. Posse Comitatus Act

The Posse Comitatus Act provides that whoever "willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" violates federal law. 18 U.S.C. § 1385.[10] The PCA was adopted in 1878 in response to objections from southern States to United States Army participation in civilian law enforcement during Reconstruction. As stated by the Fifth Circuit in United States v. Allred, 867 F.2d 863, 870 (1989), "The legislative and judicial history of the Act . . . indicates that its purpose springs from an attempt to end the use of federal troops to police state elections in ex-Confederate states."

There are persuasive indications that the PCA is not intended to prohibit military assistance to civilian law enforcement activity that does not entail coercion, regulation, or personal contact with civilian subjects. See H.R. Rep. No. 71, Part II, 97th Cong., 1st Sess. 3 (1981), reprinted in 1981 U.S.C.C.A.N. 1781, 1785. Assisting civilian law enforcement personnel in modern-day electronic surveillance monitoring operations -- operations which, in themselves, involve no direct physical contact with civilian subjects -- entails none of these risks and would therefore appear to be outside the intended scope of the PCA.

In Bisonette v. Haig, 776 F.2d 1384 (8th Cir. 1985), aff'd, 485 U.S. 264 (1987), the court set forth the following test for deciding whether given military activity violates the PCA:

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[9] In contrast, some activities associated with electronic surveillance operations that would entail significant risk of physical contact or confrontation -- such as physical placement of "bugging" equipment inside a targeted premises -- might well violate the PCA or possibly section 375. Based on the materials submitted with your request, it is not our understanding that such activities are contemplated for military personnel or that your request for opinion extends to such activities.

[10] It is now well-established that the PCA's restrictions, whatever they may be, apply only to Army and Air Force personnel and do not apply to Navy or Marine Corps personnel. United States v. Yunis, 924 F.2d 1086, 1093 (D.C. Cir. 1991); United States v. Roberts, 779 F.2d 565, 567 (9th Cir.), cert. denied, 479 U.S. 839 (1986); State v. Short, 775 P.2d 458, 459 (Wash. 1989).

> When this concept is translated into the present legal context, we take it to mean that military involvement, even when not expressly authorized by the Constitution or a statute, does not violate the Posse Comitatus Act unless it actually regulates, forbids, or compels some conduct on the part of those claiming relief. . . . The same thing is true, as we have previously noted, of the use of military personnel, planes, and cameras to fly surveillance and the advice of military officers in dealing with the disorder, advice, that is, as distinguished from active participation or direction.

776 F.2d at 1390 (emphasis added). The court went on to state that "aerial photographic and visual search and surveillance" is not the "sort of activity" that violates the PCA. Id. at 1391.

This interpretation finds support in other decisions of the federal appeals courts, which have applied the PCA's restrictions in a similarly narrow manner. See, e.g., United States v. Yunis, 924 F.2d at 1094 (PCA allows assistance to civilian law enforcement authorities if it does not subject civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature); United States v. Bacon, 851 F.2d 1312, 1313-14 (11th Cir. 1988) (Army agent's undercover role in state drug investigation did not "pervade" activities of civilian officials, did not subject citizenry to regulatory exercise of military power, and therefore did not violate the PCA); United States v. Hartley, 796 F.2d 112, 114-15 (5th Cir. 1986) (Air Force personnel's participation in defendants' arrest by Customs agents by tracking of aircraft transporting marijuana and radioing other officers of its presence was not "widespread" or "direct" so as to violate PCA). See also United States v. Stouder, 724 F. Supp. 951, 953 (M.D.Ga. 1989) ("in investigating defendant's possible fraudulent conduct, assisting FBI agents in executing a court-authorized search and preserving seized evidence for use at trial, Air Force personnel were not regulating the conduct of [any person], were not proscribing any person's conduct, and were not compelling anything of anybody" and "thus were not engaged in execution of the laws and the Posse Comitatus Act does not possibly apply").[11]

[11] State court decisions are in accord, e.g., City of Airway Heights v. Dilley, 45 Wash.App. 87, 724 P.2d 407, 409-10 (Wash.App. 1986) ("While it might be wrong to engage military force to enforce civilian law, engaging military expertise alone does not violate the act."); Lee v. State, 513 P.2d 125 (Okla.Crim.App. 1973), cert. denied, 415 U.S. 932 (1974) (military personnel must assume greater authority than that permitted to civilians for PCA to be violated).

As reflected in these cases, the courts have employed three slightly varying formulations of the test for determining whether military involvement in civilian law enforcement has crossed the line separating proper activity from violations of the PCA: (1) whether the activities constituted the exercise of regulatory, proscriptive, or compulsory military power; (2) whether they amounted to direct, active involvement in the execution of the laws; or (3) whether they pervaded the activities of civilian authorities. See United States v. Yunis, 924 F.2d at 1094. Mere assistance by military personnel in the monitoring of court-authorized electronic surveillance by civilian authorities does not violate any of those standards. It is neither regulatory nor proscriptive, nor is it a compulsory application of military power; it does not constitute "execution of the laws" at all, let alone "active" or "direct" execution; and it clearly does not "pervade" the activities of civilian authorities. Compare United States v. Bacon, 851 F.2d at 1314 ("In this case the limited military participation was nothing more than a case of assistance to civilian law enforcement efforts by military personnel and resources. This does not violate the statutory prohibition of the Posse Comitatus Act.").

In 1978, this Office concluded that military law enforcement assistance does not violate the PCA where "there is no contact with civilian targets of law enforcement, no actual or potential use of military force, and no military control over the actions of civilian officials." Letter from Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to Deanne Siemer, General Counsel, Department of Defense (March 24, 1978) ("Lawton Letter"). This interpretation of the PCA is consistent with the similarly narrow application of PCA restrictions reflected in subsequent court decisions on the issue, as summarized above. Monitoring of electronic surveillance authorized by ECPA would entail none of the critical factors cited in the Lawton Letter.

In sum, under the prevailing judicial interpretations of the PCA, as well as under the interpretations of this Office, participation by military personnel in the monitoring of court-authorized civilian wiretaps would not violate the PCA.