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 JAMIE GORELICK
DEPUTY ATTORNEY GENERAL

From: Walter Dellinger
Assistant Attorney General

Re: Use of Military to Enforce Immigration Laws

Introduction and Summary

Your office has requested our opinion whether, and under what conditions, members of the United States Armed Forces may have authority to detain for questioning or make arrests of aliens suspected of violating the immigration laws. We assume that this inquiry does not presuppose a situation of domestic emergency, civil disturbance, or insurrection that would authorize the broad use of the Armed Forces under the provisions of 10 U.S.C. §§ 331-335.

The Posse Comitatus Act (PCA), 18 U.S.C. § 1385, the military law enforcement provisions of 10 U.S.C. § 375, and Department of Defense (DOD) regulations promulgated under those statutes would generally prohibit members of the Armed Forces from directly detaining or arresting alien suspects. Although both the PCA and section 375 provide that otherwise prohibited military law enforcement activities may be lawfully undertaken if authorized by some other federal law, we find no such separate statute that would authorize the military enforcement activity in question.

However, the distinct status of the Navy and Marine Corps under these laws allows the Secretary of the Navy (subject to approval by the Secretary of Defense) to approve exceptions to the PCA and section 375 restrictions on Navy and Marine Corps law enforcement activities on a case-by-case basis. DOD Directive No. 5525.5, Encl. 4, Para. C (Jan. 15, 1986) (Directive 5525.5). Under the regulatory criteria, these authorized exceptions could extend to alien detention and arrest activity if the scope of illegal immigration activities were substantial enough to "pose[] a serious threat to the interests of the United States" and if the Justice Department's ability to enforce the immigration laws

"would be impaired seriously" if the assistance were not provided "because civilian assets [were] not available to perform the missions." Id. Para. C.2.a.

ANALYSIS

1. 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. 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 856, 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."

Review of the PCA and its history shows that it is intended to prohibit military assistance to civilian law enforcement activity if the military personnel engage in coercion, regulation, or direct enforcement 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. In Bisonette v. Haig, 776 F.2d 1384, 1390 (8th Cir. 1985), aff'd, 485 U.S. 264 (1988), the court described the general parameters of PCA restrictions in language which fairly reflects the prevailing judicial view:

> When this concept is transplanted 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.

Other cases have focused on whether challenged military law enforcement activity is "direct," "active," or "pervasive" in determining whether it violates PCA restrictions. See, e.g., United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991); Hayes v. Hawes, 921 F.2d 100, 103-04 (7th Cir. 1990).

Under these standards, it seems clear that direct use of the military to detain or arrest suspect aliens would violate the PCA, unless otherwise authorized by law. See, e.g., United States v. Red Feather, 392 F. Supp. 916, 922 (D.S.D. 1975). Although indirect military assistance to civilian officers in detention and arrest activities has been sustained under the PCA, see United States v. Hartley, 796 F.2d 112, 114 (5th Cir. 1986), frontline military participation in such activities would clearly entail the kind of direct, active compulsion recognized to violate the act in Bisonette and other pertinent precedents. Moreover, DOD

regulations interpreting the PCA specifically prohibit arrest and detention operations. DOD Directive 5525.5, Encl. 4, Para. A.3.b, and c.

It is important to stress, however, that the PCA does not apply to the United States Navy or Marines. Yunis, 924 F.2d at 1093; United States v. Roberts, 779 F.2d 565, 567 (9th Cir.), cert. denied, 479 U.S. 839 (1986); Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1339-40 (9th Cir. 1987), cert. denied, 112 S. Ct. 1514 (1992).[1] However, both DOD and the Department of the Navy have promulgated regulations that voluntarily impose the restrictions of the PCA upon the Navy and Marine Corps. DOD Directive 5525.5, Encl. 4, Para. C.; SECNAVINST 5400.12A, p. 2 and 5820.7. As the DOD Directive states:

> DOD guidance on the Posse Comitatus Act . . ., as stated in enclosure 3, is applicable to the Department of the Navy and the Marine Corps as a matter of DOD policy, with such exceptions as may be provided by the Secretary of the Navy on a case-by-case basis. (emphasis added.)

Insofar as they are based upon the PCA, these voluntary regulations restricting law enforcement use of Navy and Marine Corps personnel -- imposed "as a matter of DOD policy" -- could be rescinded by the Secretary of Defense. Moreover, the DOD Directive specifically provides that the Secretary of the Navy may approve exceptions from the PCA's restrictions on Navy/Marine Corps law enforcement assistance activity on a case-by-case basis. Directive, Encl. 4, Para. C. Where such exceptions would involve Navy or Marine Corps personnel in direct law enforcement activities such as arrests or detentions, the prior approval of the Secretary of Defense would also be required. Id. Para. C.2. (discussed further infra).

Thus, if the PCA constituted the only legal restriction on military law enforcement assistance activity, the use of Navy and Marine Corps personnel to detain or arrest alien suspects could be permitted by administrative action on the part of the Secretary of Defense. However, even if the Secretary of Defense did rescind DOD's policy of voluntary subjection of the Navy and Marine Corps to PCA restrictions, other applicable restrictions contained in chapter 18 of Title 10, U.S. Code, would remain to be considered.

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[1] There is some earlier authority to the contrary, e.g., United States v. Walden, 490 F.2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974), but the view expressed in Yunis and Roberts is both more persuasive and prevalent.

2. Chapter 18 and 10 U.S.C. § 375

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., 2d Sess. 450 (1988), reprinted in 1988 U.S.C.C.A.N. 2503, 2577-78 [hereinafter "1988 Conf. Rep."].

Following the sections of chapter 18 that authorize various categories of military law enforcement assistance, 10 U.S.C. §§ 371-74,[2] section 375 provides as follows:

> 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.

The underlying Conference Report reflects the concerns influencing the enactment of section 375:

> The conferees recognize that the magnitude of the drug problem has led to calls for the military to be directly involved in search, seizures, and arrests. The conferees, however, do not believe that it is appropriate to make such a radical break with the historic separation between military and civilian functions without clear and compelling evidence that such an action would result in a substantial reduction in the drug problem. The overwhelming weight of the evidence is that no such change would come from giving the military police powers.

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[2] E.g., 18 U.S.C. §§ 371 ("Use of information collected during military operations"), 372 ("Use of military equipment and facilities"), 373 (("Training and advising civilian law enforcement officials"), and 374 ("Maintenance and operation of equipment").

1988 Conf. Rep. at 452, 1988 U.S.C.C.A.N. at 2580.

The regulations mandated by section 375 are presently contained in the above-mentioned DOD Directive 5525.5.[3] Enclosure 4 of the Directive sets forth "Restrictions on Participation of DOD Personnel in Civilian Law Enforcement Activities." Paragraph A.3 ("Restrictions on Direct Assistance") provides as follows:

> Except as otherwise provided in this enclosure, the prohibition on the 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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> a. Interdiction of a vehicle, vessel, aircraft, or other similar activity.
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> b. A search or seizure.
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> c. An arrest, apprehension, stop and frisk, or similar activity.
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> d. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.

(Emphasis added.)

Thus, both section 375 itself and the DOD implementing regulations make it clear that, unless "otherwise authorized by law," Armed Forces personnel are not permitted to be used to detain persons for questioning or to make arrests. Inasmuch as section 375 and its implementing regulations apply in terms to the Navy and Marine Corps, these restrictions (unlike the PCA) would generally apply to all branches of the Armed Forces. However, this is not invariably the case.

a. Section 378 ("Grandfather Clause"). Potential authorization for more expansive law enforcement use of Navy and Marine Corps personnel may be found in the provisions of 10 U.S.C. § 378, captioned as "Nonpreemption of other law." Section 378 qualifies the restrictions reflected in 10 U.S.C. §§ 371-77 by providing, "Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or

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[3] The regulations now contained in Directive 5525.5 were previously contained in the Code of Federal Regulations, 32 CFR Part 213 (1992). However, Part 213 was removed from the CFR in 1993 (together with two unrelated DOD CFR Parts), with the cryptic explanation that, "These parts have served the purpose for which they were intended and are no longer valid." 58 Fed. Reg. 25,776 (1993). The Federal Register entry also indicated that the regulations previously codified as Part 213 were now set forth in DOD Directive 5525.5.

equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981."

This proviso was carefully construed and applied by the Ninth Circuit in United States v. Roberts, 779 F.2d at 567-68, to determine if the use of a Naval vessel to intercept a drug-smuggling ship in the Pacific Ocean violated 10 U.S.C. § 374. That section, which authorizes the use of military personnel to operate equipment in support of civilian law enforcement, limited the permissible operations in the context in question to "Detection, monitoring, and communication of the movement of air and sea traffic." Id. § 374(b)(2)(A). The court therefore determined that, since the Naval vessel in question was used for physical interdiction, the activity was not permitted by section 374. The court then turned to the application of section 378:

> Section 378 requires that we determine the legal authority of the executive branch to use the Navy for civilian law enforcement purposes before December 1, 1981. If the exercise of authority here would have been within the legal authority of the executive branch if it had occurred prior to December 1, 1981, section 378 immunizes what would otherwise be a violation of section 374.
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> The government concedes that prior to December 1, 1981, Naval Instruction 5820.7 (issued May 15, 1974 and still in effect today) adopted for the Navy, as a matter of policy, the restrictions of the Posse Comitatus Act but authorized exceptions to this policy when specific approval of the Secretary of the Navy was granted.

779 F.2d at 567. The court continued, "The pivotal question becomes whether the Secretary of the Navy in fact approved the Navy activity involved here. If so, there has been no violation of section 374." Id. at 568.

The court went on to hold, however, that since the Secretary of the Navy had authorized direct Naval drug interdiction operations only in the Atlantic Ocean, the subject interdiction in the Pacific Ocean had not been properly exempted from the section 374 restrictions.

Roberts makes clear, however, that valid Navy regulations antedating enactment of the Chapter 18 restrictions allowed the Secretary of the Navy, on a case-by-case basis, to approve law enforcement activities by Navy and Marine Corps personnel that would

otherwise be prohibited by section 375. This exemptive authority has been carried forward in Paragraph C of Enclosure 4 to DOD Directive 5525.5, which provides as follows:

> DOD guidance on the Posse Comitatus Act . . . is applicable to the Department of the Navy and the Marine Corps as a matter of DOD policy, with such exceptions as may be provided by the Secretary of the Navy on a case-by-case basis.
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> 1. Such exceptions shall include requests from the Attorney General for assistance under 21 U.S.C. § 873(b) [drug interdiction operations].
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> 2. Prior approval from the Secretary of Defense shall be obtained for exceptions that are likely to involve participation by members of the Navy or Marine Corps in an interdiction of a vessel or aircraft, a law enforcement search or seizure, an arrest, apprehension, or other activity that is likely to subject civilians to use [of] military power that is regulatory, proscriptive, or compulsory. Such approval may be granted only when the head of the civilian agency concerned verifies that:
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> a. The size or scope of the suspected criminal activity poses a serious threat to the interests of the United States and enforcement of a law within the jurisdiction of the civilian agency would be impaired seriously if the assistance were not provided because civilian assets are not available to perform the missions; or
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> b. Civilian law enforcement assets are not available to perform the mission and temporary assistance is required on an emergency basis to prevent loss of life or wanton destruction of property.

(Emphasis added.)

The provisions of subparagraph 2.a of this exception could enable the Secretary of Defense, upon proper certification from the Attorney General, to authorize Marine Corps or

Navy personnel to undertake the arrest or detention operations in question.[4] For that paragraph to apply, however, several key questions would have to be answered affirmatively.

One question is whether the kind of immigration activity targeted in the proposed operations could be characterized as "criminal activity." In that regard, 8 U.S.C. § 1325 makes it a crime for aliens to (1) enter the United States at an unauthorized time or place; (2) elude examination or inspection by immigration officers; or (3) attempt or gain entry into the United States by false representations or willful concealments. Additionally, 8 U.S.C. § 1324 criminalizes the smuggling and harboring of illegal aliens. Thus, in a situation of mass illegal immigration activities, the "criminal activity" element of subparagraph 2.a would be satisfied.

Second, the targeted immigration activities would have to "pose a serious threat to the United States." Again, in a situation involving large numbers of undocumented aliens seeking entry to the United States, such as in a boatlift situation, this criterion could be satisfied.

Finally, the Attorney General would also have to verify that sufficient civilian assets are not available to conduct the subject operations and, therefore, enforcement of the immigration laws would be seriously impaired if the military assistance were not provided. In this regard, it seems unlikely that military assistance would be sought unless the circumstances described under this condition were present.

In sum, although the PCA and section 375 would prohibit the subject activities as a general matter, it appears that the "grandfather clause" of section 378 (coupled with DOD and Naval Regulations) would permit Marine Corps or Navy personnel to perform those activities, upon approval of the Secretary of Defense, in situations where crisis conditions strain the capacity of the Department and INS to enforce the immigration laws.

3. Other Applicable Laws

The prohibitions of the PCA and section 375 also do not apply if there is other statutory authority for particular law enforcement use or deployments of Armed Forces personnel. The PCA's prohibition against use of the Army or Air Force to "execute the laws" is subject to the proviso, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. Section 375's

[4] It is also possible that the conditions of subparagraph 2.b might justify an exemption from the restrictions in this context, but we believe it is considerably less likely that those conditions would be satisfied. This is due to 2.b's requirement that the assistance must be required "on an emergency basis to prevent loss of life or wanton destruction of property," which presents a higher threshold of crisis than that described in subparagraph 2.a.

restrictions are similarly qualified by the phrase, "unless participation in such activity by such member is otherwise authorized by law."

DOD Directive 5525.5 contains a list (not purporting to be exhaustive) of "laws that permit direct military participation in civilian law enforcement." Directive, Encl. 4, Para. A.2.e. The list includes laws on subject ranging from assistance in dealing with crimes against foreign officials or members of Congress, 18 U.S.C. §§ 112, 351, and 1116; removal of persons unlawfully present on Indian lands, 25 U.S.C. § 180; and execution of quarantine and certain health laws, 42 U.S.C. § 97. However, none of these provisions would be applicable to the particular kind of activity at issue here.

Another possible statutory exception is contained in section 103 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1103. That section charges the Attorney General with the administration and enforcement of "all . . . laws relating to the immigration and naturalization of aliens" and provides that:

> [She] is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the [Immigration and Naturalization] Service.

(Emphasis added.)

If this provision's reference to "any employee of the United States" encompasses Armed Forces personnel, then the Attorney General could confer the powers and duties of INS officials upon them. Those powers include the authority to detain suspected immigration law violators for questioning and to arrest such violators in appropriate circumstances. See, e.g., 8 U.S.C. §§ 1222, 1225(b), 1252, 1324, and 1357; 8 C.F.R. §§ 232.1, 237.2, 242, and 287.3 (1993).

The INA does not define the term "employee of the United States." Moreover, the legislative history of the INA contains no useful explanation or references concerning section 103's grant to the Attorney General of authority to deputize "employees of the United States" to exercise the same powers exercised by officials of the INS.

Given the paucity of useful legislative history on the intended meaning of the term in context, we have considered whether that same term generally encompasses Armed Forces personnel when used and defined in other sections of the U.S. Code. Based upon those definitions of the term we identified in the Code, it appears that the term is used

inconsistently.[5] While no hard conclusions can be drawn from this incomplete survey, it does indicate that statutory use of the term "employee [of the United States]" does not necessarily, or even generally, encompass members of the Armed Forces.[6] In this regard, we consider it particularly significant that the definition of "employee" use in Part III ("Employees") of Title 5 of the United States Code, which covers the general subject of "Government Organization and Employees," does not include members of the Armed Forces. 5 U.S.C. § 2105. Thus, we do not think that section 103's reference to "any employee of the United States" should be construed to encompass Armed Forces personnel as a matter of generally accepted statutory usage.

On the other hand, a court of appeals has held that a statute containing no specific reference to military personnel could constitute an "authorized by law" exception to the restrictions of the PCA. United States v. Allred, 867 F.2d 856 (5th Cir. 1989). In Allred, the issue was whether an Air Force JAG Officer, serving as a specially designated special assistant to the United States Attorney, could participate in the investigation, presentation, and prosecution of a non-military federal criminal case without violating the PCA. In describing the defendants' argument that the PCA had been violated, the court stated, "Appellants would have this Court hold that [the military lawyer's] 'hybrid position constitutes the very merger of the civil laws and military authority that the Posse Comitatus Act prohibits.'" 867 F.2d at 870.

In an opinion by Judge Frank Johnson, the Fifth Circuit determined that it was unnecessary to decide whether the substance of the PCA was violated because the JAG Officer's participation in the case fell within the exception applicable to activities "expressly authorized by . . . Act of Congress." As the Court explained:

> Congress, by authorizing the appointment of Special Assistant United States Attorneys and Assistant United States Attorneys to assist the

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[5] For example, the following statutes defined the term "employee" (when used in a context clearly referring to federal government employees) or "employee of the United States" so as not to encompass members of the Armed Forces: 5 U.S.C. § 2105(a) (government organization and employees); 19 U.S.C. § 2081(e) (undercover operations of U.S. Customs Service); 22 U.S.C. § 3902 (general provisions of Foreign Service title); and 25 U.S.C. § 450i (general provisions concerning affairs of Indians and tribal organizations). The following identified statutes define those terms to include members of the Armed Forces: 5 U.S.C. § 7342(a)(1)(D) (receipt and handling of foreign gifts and decorations); 5 U.S.C. § 7905(a)(1) (programs to encourage car-pooling by federal employees); and 22 U.S.C. § 2403(j) (foreign assistance general provisions).

[6] We also note that various court decisions, determining the appropriate scope of the employment discrimination laws in the military departments, have drawn a clear legal distinction between civilian government employees and members of the Armed Forces. E.g., Bledsoe v. Webb, 839 F.2d 1357, 1359 (9th Cir. 1988) ("Employees of the 'military departments' are distinguishable from members of the 'armed forces.'"); Frey v. State of California, 982 F.2d 399, 403 (9th Cir.), cert. denied, 113 S. Ct. 3000 (1993) (Congress intended the "military departments" to consist of "civilian employees" and the "armed forces" to consist of "uniformed military personnel").

> Attorney General, has authorized [the military lawyer's] appointment. 28 U.S.C. §§ 515, 543. This authorization contains no limitation on the persons whom the Attorney General may appoint, nor does it indicate any limitations on the duties which the appointee may perform. Instead, section 515 indicates that the appointed attorney may "conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings." As this Court has indicated, this statute exists as an indication of authority, not as a limitation.

867 F.2d at 871.[7] The court further observed:

> Considering the Posse Comitatus Act's own indication that it should be interpreted in light of the co-existing statutory framework, it seems clear that [the military lawyer's] participation in no way violates the Act's provisions.

Id.

Allred provides some support for the view that the "otherwise provided by law" exceptions from the PCA and section 375 should not be narrowly applied, since the provisions for appointment of special government attorneys that it construed contained no language indicating an intent to expand military law enforcement authority beyond the generally applicable limitations. On the other hand, the Allred opinion can not be viewed as an especially persuasive precedent for purposes of the issue at hand, because it dealt with a form of law enforcement activity (legal representation) that only marginally touches the genuine concerns of the PCA and section 375. Finding that the provision of legal assistance to federal prosecutors by military attorneys is "otherwise authorized by law" seems a far cry from making such a finding in the case of using military personnel for detentions and arrests -- activities that are at the core of the statutory concerns. The authorization-by-law required to satisfy the two statutes in this more intrusive context should meet a higher standard of clarity and, if the allegedly authorizing statute's text is not dispositive, congressional intent.

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[7] The court went on to hold that the JAG Officer's participation was also authorized by 10 U.S.C. § 806(d)(1), which it treated as another "otherwise authorized by law" exception to the PCA. That statute provides that a JAG Officer assigned "to perform the functions of a civil office in the Government . . . may perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases." Id.

In sum, neither the text of the statutes, their legislative history, nor the pertinent caselaw provides a clear indication of whether courts would construe the Attorney General's deputization authority under section 103 of the INA as a proper statutory exception from the restrictions of the PCA and section 375. If that provision does authorize the use of military personnel for the confrontational law enforcement activities at issue, it would represent a sharp departure from the traditional restrictions embodied in those laws. Accordingly, such a conclusion should rest on a well-founded conviction that Congress intended such a result; it cannot be assumed that Congress would approve such a major change in the military's permissible law enforcement role without providing some specific indication that it was doing so.[8] We do not think such a conviction is warranted in the case of section 103 of the INA. Neither the legislative history nor the text of the statute give any hint that Congress was contemplating a major departure from traditional statutory and policy restrictions on military law enforcement activities.

[8] Cf. Frey v. State of California, 982 F.2d at 404 ("[I]f Congress had intended to encroach upon the special status of the military in our system . . . , it would have expressed its intention clearly.").