



## WASHINGTON OFFICE ON LATIN AMERICA

### MEMORANDUM

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## WHO'S IN CHARGE? FOREIGN ASSISTANCE RESPONSIBILITIES SHIFT FROM STATE TO DEFENSE

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### Introduction

Recently, there has been a significant and growing public discourse on the subject of the appropriate role of the military in the civilian affairs of the United States. Much of the debate has come on the heels of hurricane Katrina and the catastrophic governmental failure to protect U.S. citizens from harm, much of it preventable. President Bush has suggested more than once since the disaster that Congress should examine the law, commonly known as the Posse Comitatus Act,<sup>1</sup> which, in most cases, prevents the use of the military in a law enforcement capacity.

The people of this country have come to enjoy the benefits of a division of responsibilities between our military and our police. The military is trained to fight and win wars. When appropriately applied, their job is to provide overwhelming, lethal force to obtain a military objective. They do so through a chain of command which is not locally responsible. The police, on the other hand, are from the local community, are trained to enforce laws and to do so with the minimum force necessary. These are separate responsibilities, and their distinction is in danger of being eroded if the idea of domestic military law enforcement gains momentum.

Over a longer period of time, there has been another, more subtle, shift in the workings of the U.S. government as it relates to the use of the military: whereas the conduct of U.S. foreign policy has traditionally and legally been under the jurisdiction of the Department of State, many of those responsibilities have shifted to the Department of Defense, particularly in the areas of foreign military and security assistance. This shift began with the war on drugs and to date has played out largely in Latin America. Yet a recent move by Congress to give the Secretary of Defense the authority to build the capacity of foreign military forces for counter-terror purposes, through the provision of equipment, training and supplies, is likely to have implications for U.S. foreign policy worldwide.

The inclination on the part of our policymakers to lean toward military solutions to non-military, social, economic, and political problems may be further hastened if Congress grants the Defense Department greater authority to make decisions about foreign aid and administer foreign aid programs. This memo provides a brief description of some of the turning points in the militarization of foreign aid decision-making and an analysis of the impact that such a shift in responsibility has on foreign policy outcomes.

## **Posse Comitatus Act**

The Posse Comitatus Act states that “Whoever, except in cases under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”<sup>2</sup> During the Reconstruction era in the South, the military was regularly put to use against civilians and the widespread mistreatment that resulted gave rise to the Act.

Over the past few years recurring questions have been raised about the need for such a bright line dividing military and police roles, and there have been several attempts in Congress to legislate the use of the active duty military along the borders of the United States. For instance, former Representative James Traficant (D-OH) had for several consecutive years offered an amendment to the Defense Authorization bill that would send as many as 10,000 military troops to the border to counter drug trafficking. These initiatives were consistently rejected by Congress as a dangerous violation of the principle underlying Posse Comitatus. This principle is an important legal protection against abuses of a powerful and often lethal military against the civilian population. While Posse Comitatus applies to U.S. security forces in the United States, it does not apply to U.S. military programs with other nations.

For many, the importance of Posse Comitatus was reaffirmed when, on May 20, 1997, Ezequiel Hernández, an 18-year-old shepherd who was tending his flock, was shot and killed by a U.S. Marine who was conducting counter-drug reconnaissance near El Paso, Texas. Yet Congress appears not to have learned the lessons from that case. Even today there are reports of soldiers with machine guns, humvees, and Stryker armored vehicles stationed along the U.S.-Mexico border “to observe the border for suspected transnational threats,”<sup>3</sup> and report suspicious activities to law enforcement agents. Moreover, the House Armed Services Committee, in its version of the current Defense Authorization bill, continues to urge the Defense Department to undertake controversial counter-drug observation roles.<sup>4</sup>

## **Foreign Assistance Act of 1961**

In 1961, President Kennedy sent Congress a message calling for an overhauling of the foreign aid process. Congress responded by passing the Foreign Assistance Act of 1961, replacing the existing Mutual Security Act. The new law allowed for the future separation of military and economic aid budgets. Both budgets remained within the jurisdiction of the State Department.

While over 40 percent of the foreign assistance authorizations went to military assistance in Fiscal Year 1962,<sup>5</sup> no one at the time was considering any change in the State Department’s jurisdiction over authorization of military assistance programs.

Over the years, foreign aid legislation has included several restrictions designed to ensure compliance by foreign nations with certain requirements, including adherence to important human rights provisions and democracy protections. One example of a significant human rights restriction is the “Leahy law,”<sup>6</sup> named for its principle sponsor, Senator Patrick Leahy (D-VT). The provision prohibits aid to foreign military units that violate the human rights of their people with impunity. Other restrictions include provisions that prohibit foreign assistance to countries that grant sanctuary to terrorists or otherwise support international terrorism, are in default on loans, have had their elected head of government ousted by a military coup or decree, or restrict the delivery of U.S. humanitarian assistance. When approving foreign aid, Congress also takes into consideration the country's defense budget as a proportion of its total budget and the status of the country's dues and arrears with the United Nations.

To assure that the countries are in conformity with the laws, the congressional process has included oversight by the foreign authorization and appropriations committees of jurisdiction.

### **The “Drug War” and Section 124: The Shift to the Pentagon Begins**

This understood division of jurisdiction continued for decades after the passage of the Foreign Assistance Act. However, a watershed event in the change toward involvement of the Department of Defense in foreign aid funding grew from a series of decisions surrounding the nation’s effort to combat illegal drug use.

Drug use in the United States grew steadily in the 1960s and 1970s and by the 1980s the problem had reached such proportions that it began to overwhelm the nation and became a central factor in the political process.

Responding to the increasing concern, the Joint Chiefs of Staff of the military conducted a secret six-month study in 1984 which resulted in recommendations that the military should have a greater role in combating the drug trade. But the civilian leadership was not ready for such a change and Secretary of Defense Casper Weinberger dismissed the recommendation.<sup>7</sup>

In 1986, Congress passed an amendment to the Foreign Assistance Act that required the president to “certify” that countries identified by the State Department as major contributors to the drug trade were cooperating with the United States in efforts to halt the trade. According to the law, half of the economic and military aid to a country that was not certified to be in compliance would be cut. But the certification process proved to be little more than a façade as President Reagan would not decertify any country that was an ally and all the countries that were decertified did not receive aid in the first place. This was a very controversial law in Latin America because the United States, the main consumer of drugs, was passing judgment on the region.

Domestic pressure grew on the Reagan administration to become more aggressive in the fight against illicit drug use, especially in the election year of 1988. The House and Senate Armed Services Committees, along with the Investigations Subcommittee and the Defense Policy Panel of the House, held a series of hearings over the summer of 1988 entitled “The Role of the Military in Drug Interdiction.”

Central to the debate over whether to use the military in such a role was the Posse Comitatus law. Defense Department witnesses at the hearings were unified in their opposition to expanding the role of the military, warning against the use of the military in a police role. When Assistant Secretary of Defense Grant Green voiced that opinion he was roundly criticized by members of the Committees. Charles Bennett (D-FL) said, “We are trying to fight drugs. Instead of coming up with an urgent effort to fight them, you are making all kinds of excuses for not doing it.”<sup>8</sup> In the heated exchange, Mr. Bennett went on to say that “there is absolutely no constitutional prohibition against directing the military to make arrests and seizures. None whatsoever.”<sup>9</sup> And, “The comitatus law is not a noble law. It is a very simple evil law. It ought to be repealed in its totality. It has to do with the Banana Republic.”<sup>10</sup>

The protective principles involved in the concept underlying Posse Comitatus were not the only source of reluctance at the Pentagon. Assistant Secretary Green noted that the Department of Defense also objected to the use of the military in the drug fight because of the “impact that it has on readiness, and on training that is more productive, in fact, than doing this.”<sup>11</sup>

Another vociferous champion for the use of the military in the fight against drugs was California Democrat, Barbara Boxer. In addressing the Defense Department panel of witnesses, she said, “I will tell you from discussions with my constituents right now, there are a number of things on their minds, and none could be higher than the threat to the society as caused by drugs, and for us not to utilize all the

resources we can muster would be irresponsible. For you to resist this, on a more or less knee-jerk fashion because it is different, and it is unusual, is very upsetting.”<sup>12</sup>

At the final hearing in the series, Secretary of Defense Frank C. Carlucci, III, maintained the Department opposition to the use of the military in the law enforcement roles envisioned by the Armed Services Committees. In prepared testimony, he wrote in part, “I remain absolutely opposed to the assignment of a law enforcement mission to the Department of Defense. I am even more firmly opposed to any relaxation of the Posse Comitatus restrictions on the use of the military to search, seize and arrest. I have discussed this matter with the President and other senior members of his Cabinet, and I can report that these views are shared throughout this Administration.”<sup>13</sup>

In the end, the defense authorization bill scrapped earlier attempts that would have permitted military personnel to make arrests. A compromise allowed the military to participate in detection and monitoring of air and sea traffic which were seen as more customary roles for the military. Still, it represented a significant step for the military to have such a formal mission in the traditionally civilian realm of law enforcement activities.<sup>14</sup>

The following year, the defense authorization bill repealed this section and instead made it permanent law in Section 124 of Title 10 of the United States Code. This made the military the permanent “single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.”<sup>15</sup> The conferees wrote, “In assigning significant responsibilities for drug interdiction and law enforcement support to the Department of Defense, the committee affirms that the military of the United States is a national asset that must be utilized as part of our effort to address this threat to our society and national security.”<sup>16</sup>

### **Section 1004**

The detection and monitoring roles allowed by Section 124 did not specifically authorize the Department of Defense to obtain jurisdiction over the fiscal responsibility for providing specific assistance to foreign countries, but it opened the door to that concept. In the Fiscal Year 1991 Defense Authorization Act, a temporary measure which allowed the Department of Defense to use defense budget resources for foreign assistance was included in Section 1004.<sup>17</sup> The authority broke new ground in allowing the U.S. military to control the decision-making process regarding the provision of training of certain foreign security forces, including civilian police, and provide counter-drug assistance to foreign countries. This temporary authority has been renewed each time it has neared expiration. These types of assistance had, until then, been under the jurisdiction of the State Department, but now Pentagon-funded military assistance programs – mostly counter-drug training authorized by Section 1004 – represent more than half of U.S. military training for Latin America. In 2004, the Defense budget funded 57 percent of all Latin Americans who received training at U.S. expense (8,908 out of 15,634 grant trainees).

### **Section 1033**

Further erosion of State Department authority came seven years later when Congress included Section 1033 in the 1998 Defense Authorization Act.<sup>18</sup> Section 1033 was originally written to allow the Department of Defense to assist Peru in its efforts to stand up a counter-drug riverine force in the Amazon. At the last minute of legislative maneuvering on the bill, the country of Colombia was added as an eligible country to receive such aid.

The authorities in this section went beyond riverine support and beyond Latin America when, in the Fiscal Year 2004 Defense Authorization Act, Congress extended and expanded the authority for the

Department of Defense to provide general counter-drug support to Afghanistan, Bolivia, Ecuador, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan.<sup>19</sup>

### **Regional Defense Counter-Terrorism Fellowship Program**

In 2002 an initiative appeared in the Defense Appropriations bill called the Regional Defense Counterterrorism Fellowship Program (CTFP).<sup>20</sup> The program closely parallels the annually funded International Military Education and Training (IMET) program in foreign aid appropriations. CTFP allows the Secretary of Defense to use a portion of the defense operations and maintenance budget to train foreign military officers in U.S. military educational institutions, as does IMET, but with an emphasis on counterterrorism. The program was made permanent the following year.<sup>21</sup>

CTFP is becoming a significant source of funding for U.S. training of Latin American forces. In 2003, 431 Latin Americans were trained directly through the Pentagon using the CTFP authority.<sup>22</sup> In 2004 that number rose to 1107.<sup>23</sup>

### **“Authority to Build the Capacity of Foreign Military Forces”**

When the Department of Defense sent over its budget request for Fiscal Year 2006 to Congress in early 2005, it included an initiative originally called "Partnership Security" that would give the Pentagon the authority to provide "equipment, supplies, services, training and funding" to partner nations in the name of the Global War on Terrorism. This would have established a parallel foreign security assistance program to that of the State Department.

Further, this security assistance program would not only have been directed to the militaries of the partner nations, but also to their civilian personnel. As defined, "Military and Security Forces" would have included "armies, guard, border security, civil defense, infrastructure protection, and police forces."

The Fiscal Year 2006 National Defense Authorization Act, which became Public Law 109-163, contained similar language under sections 1206 and 1207. Section 1206 establishes the authority for the Secretary of Defense to provide up to \$200 million in equipment, training and supplies directly to foreign militaries, thus circumventing the Foreign Assistance Act. It also requires a report on the "strengths and weaknesses" of the Foreign Assistance Act and suggestions on what changes to make in the way the State Department and the Department of Defense provide such aid to foreign militaries. However, this report, which was due to Congress on January 6, 2007, has yet to be delivered. In spite of this, the DOD continues to ask Congress to fund the program even though they have failed to provide a track record of the program's success.

Section 1207, "Security and Stabilization Assistance," establishes a pass-through from the Department of Defense to the State Department of defense articles and funds for the purpose of stabilizing foreign countries. According to the conference report, this has been added as a temporary authority because the conferees felt that the State Department's Office of the Coordinator for Reconstruction and Stabilization was thus far unable to fulfill its statutory authorities. In the time it takes to address this problem through the necessary bureaucratic adjustments, the Department of Defense is assigned the authority to step in and provide the assistance through the State Department.

These two sections represent the further erosion of the purpose and authority of the Foreign Assistance Act.

### **Congressional Oversight**

Over the years, foreign aid has become unpopular with politicians. Because of congressional concerns about foreign aid and, for some, a downright dislike of foreign aid programs, the Department of State has felt the need, or been required by law, to present Congress with extensive justifications and reporting on foreign assistance programs. State provides Congress with a detailed budget presentation document detailing who is provided with military training and assistance, and justifications for why that aid is needed. They also provide an annual report on the human rights conditions in the recipient countries, a report on the efforts being undertaken to fight drugs, in addition to documenting weapons transfers. There are also significant conditions, mentioned above, that apply to State-funded foreign assistance programs. These conditions and reporting requirements are important because they allow for a high level of transparency and oversight of foreign aid programs.

Comparatively, the defense budget is quite popular with members of Congress and has not come under the same congressional scrutiny as State-administered foreign assistance programs. Furthermore, the Defense Department's budget is so big, and there are so few congressional staff to oversee it, that little attention is paid to military aid programs (primarily counter-drug) that are currently funded through the defense bill. There has been little public reporting and there is not a history of providing detailed public budget justifications for the counter-drug programs that the Pentagon has been administering for the past 15 years.

Defense-funded programs are not governed by the Foreign Assistance Act and therefore not subject to the human rights and democracy restrictions therein (with the exception of the Leahy Law), and the defense committees have scant history of invoking such legislative protections. As such, it is of increasing concern that these military and security assistance programs continue to migrate away from the jurisdiction of the State Department and of the foreign authorization and appropriations committees.

### **Conclusion: Why Shifting Jurisdiction from State to Defense is a Problem**

The foreign policy implications of foreign military aid and training can be enormous, and for that reason, the State Department should be clearly in charge of programs that so greatly impact our relationship with the rest of the world.

This is not to say that there is no place for military interaction and assistance. It is to say that decisions about what may be most appropriate for a country or a region should be left to those who have a broader understanding of the problems and opportunities in those areas.

We must be vigilant about the shift in authority over military assistance programs from the State Department to the Defense Department for the following reasons:

- 1) The more that decisions about policies and funding sources devolve to the Armed Services Committees, and the more that the administration of those policies shift to the Department of Defense, the policies themselves will be influenced by the priorities of the military and less by the priorities of diplomats.
- 2) The human rights and democracy conditions on security assistance administered by the State Department do not apply to military assistance funded through the Pentagon.
- 3) The Armed Services Committee will not provide the kind of oversight that military assistance programs deserve. The intense scrutiny with which Congress oversees foreign assistance programs funded through the State Department is a good thing. There is no comparable track

record for Defense-funded counter-drug programs. Quite the opposite is true – it has been very hard to get public information about those programs.

- 4) The more we turn to the Defense Department to fund broader missions, the more it will be the only U.S. government agency with the skills to respond. Civilian sectors of our own government must be strengthened or missions will continue to migrate toward the military.
- 5) Police and civilian public officials have one set of tools to solve problems; the military has a different set of tools. As roles and responsibilities gravitate toward the Department of Defense, it is their tool kits that will be utilized to solve international problems.

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<sup>1</sup> 18 U.S. Code 1385.

<sup>2</sup> 18 U.S. Code 1385. It is worthwhile to note that this law applies to the active duty military and not to the National Guard. The National Guard, unless it is federalized, is under the control of the elected Governor of a state, and is an extension of the Governor's rights and powers within his or her state.

<sup>3</sup> Louie Gilot, "Soldiers report immigrants to Border Patrol," *El Paso Times*, October 29, 2005.

<sup>4</sup> Section 1022, House Report 108-354 to accompany HR 1588, November 2003; Section 1023, House Report 108-89 to accompany HR 1815, June 2005.

<sup>5</sup> The Foreign Assistance Act of 1961, PL 87-195.

<sup>6</sup> Originally in the Foreign Operations Appropriations Act, PL 104-208.

<sup>7</sup> Elaine Sciolino, "Fighting Narcotics; U.S. Is Urged to Shift Tactics," *New York Times*, April 10, 1988.

<sup>8</sup> Hearings, "The Role of the Military in Drug Interdiction," May, June, 1988, p.35.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, p. 40.

<sup>11</sup> *Ibid.*, p. 60.

<sup>12</sup> *Ibid.*, p. 62.

<sup>13</sup> *Ibid.*, p. 287.

<sup>14</sup> Susan Rasky, "Military Role in Drug War," *New York Times*, June 24, 1988, p. B4.

<sup>15</sup> Title 10, US Code, Section 124.

<sup>16</sup> Congressional and Administrative News, 101<sup>st</sup> Congress – First Session, 1989, p. 936.

<sup>17</sup> PL 101-510.

<sup>18</sup> PL 105-85.

<sup>19</sup> House Report 108-354, November 7, 2003, p. 747.

<sup>20</sup> PL 107-117.

<sup>21</sup> PL 108-136.

<sup>22</sup> U.S. Department of Defense and U.S. Department of State Joint Report to Congress, *Foreign Military Training In Fiscal Years 2003 and 2004*, Volume I, Released June 2004.

<sup>23</sup> U.S. Department of Defense and U.S. Department of State Joint Report to Congress, *Foreign Military Training In Fiscal Years 2004 and 2005*, Volume I, Released April 2005.