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IN THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAI KAM HO,  
JENNIE WEN CHIN PAU,

Defendants.

CRIMINAL CASE NO. 11-00082

**ORDER RE MOTION TO DISMISS (ECF  
NO. 155) FOR VIOLATION OF THE  
POSSE COMITATUS ACT OR IN THE  
ALTERNATIVE, MOTION TO  
SUPPRESS**

The Motion to Dismiss filed by Defendant Wai Kam Ho<sup>1</sup> came before this court for an evidentiary hearing on December 5, 2012, and December 11, 2012. After hearing the testimony of witnesses and argument from counsel, the court took the Motion to Dismiss (ECF No. 155) under advisement. For the reasons discussed more fully herein, the court sets forth the basis for its decision in **DENYING** said motion.

**I. FACTS**

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<sup>1</sup> Although counsel for co-defendant Jennie Wen Chin Pau did not formally submit a motion to dismiss or suppress pursuant to alleged violations of the Posse Comitatus Act, counsel for co-defendant Pau concurred with all of the arguments presented by Defendant Wai Kam Ho, which included the Posse Comitatus Act issue, during the December 11, 2012 hearing.

The court also notes co-defendant Jimmy Hsieh's Adoption of and Joinder in Motions to Dismiss. *See* ECF No. 254.

1 The court concurrently held the hearing on the instant motion with Defendant Ho's  
2 motion to suppress (ECF No. 149) and co-defendant Jennie Wen Chin Pau's motion to suppress  
3 (ECF No. 142), because the court's factual findings in this instant motion are related and similar,  
4 if not the same. During the hearing, two federal agents for the Prosecution<sup>2</sup> testified during the  
5 evidentiary hearing, and a declaration of Mr. Rico W.G. Omagap was submitted by Defendant  
6 Ho. No other testimony was offered. At the conclusion of the hearing on December 11, 2012, the  
7 court permitted the parties to submit supplemental briefing no later than December 21, 2012.

8 Based on the testimony and exhibits presented, the court makes the following factual  
9 findings:

10 In a joint investigation between the Federal Bureau of Investigation ("FBI"), Internal  
11 Revenue Service ("IRS"), and Naval Criminal Investigative Service ("NCIS"), law enforcement  
12 agents from these three agencies executed search warrants at three different locations on  
13 December 14, 2010: MGM Spa, Paradise Bingo at the Royal Orchid Hotel, and Isla Bingo at the  
14 Compadres Mall. In addition, with the consent of Defendant Ho, owner of the Club Crazy Horse,  
15 federal agents searched said establishment.

16 NCIS agents were physically present at the MGM Spa, Paradise Bingo, and Club Crazy  
17 Horse during the execution of the search warrants.<sup>3</sup> It is unclear from the evidentiary hearings  
18 held in December 2012 whether NCIS agents were physically present at the Isla Bingo location  
19 on December 14, 2010. IRS Special Agent Todd Peterson was not able to confirm NCIS's  
20 physical presence at Isla Bingo with certainty.

21 There were seven (7) confirmed NCIS agents that participated in the joint investigation:  
22 Kyle Crowther, Mario Limon, Maria Markley, Stephanie Winters, Joseph Todd, Joseph H.

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<sup>2</sup> FBI Special Agent Frank Runles and IRS Special Agent Todd Peterson.

<sup>3</sup> The court notes that there was no search warrant for Club Crazy Horse. Rather, the federal agents executed a  
"Consent to Search" form, signed by Defendant Ho, who owns Club Crazy Horse.

1 Twilley, and C. Scott Hwang. *See* Gov't. Exh. 4. It is unclear how many NCIS agents were  
2 physically present at the MGM Spa on the night of December 14, 2010. A review of the exhibits  
3 shows at least two (2) were present: NCIS Special Agents Twilley and Markley. *See* Gov't. Exh.  
4 4 at 32, and Def. Ho Exh. B and C. At Paradise Bingo, there were at least one (1) or two (2)  
5 NCIS agents. *See* Omagap Decl., Def. Ho Exh. I, ¶ 5. Joseph H. Twilley was the only NCIS  
6 agent present at Club Crazy Horse. *See* Def. Ho Exh. B.

7 As explained by FBI Special Agent Frank L. Runles during his previous testimony dated  
8 May 30, 2012<sup>4</sup>—which was prior to the filing of Defendant Ho's motion to dismiss due to  
9 alleged violations of the Posse Commitatus Act—the investigation was a joint investigation  
10 between the FBI, IRS and NCIS, “because we all have our specific areas that we're pursuing but  
11 they all go together in the case.” *See* Transcript, Def. Ho Exh. J, at 64:17-20. IRS is the lead  
12 agency for matters involving money laundering while the FBI is the lead agency for matters  
13 involving illegal gambling. *Id.* at 64:23-25. NCIS is the lead agency for matters involving Navy  
14 service members. *Id.* at 65:1-3.

15 During the December 5, 2012 evidentiary hearing, FBI Special Agent Runles reiterated  
16 his previous testimony that each agency took the lead on specific matters. Similarly, IRS Special  
17 Agent Peterson also testified that there was no overall lead agency in the entire investigation but  
18 rather, each agency led on specific matters. Specifically, NCIS was the lead agency on matters  
19 affecting military personnel.

20 Below is a detailed summary of NCIS's involvement in the joint investigation:

- 21
- 22 • May 12, 2010 – NCIS initiated a proactive investigation pursuant to reports of  
U.S. Navy personnel frequenting MGM Spa, where there is alleged illegal  
gambling and narcotics sales activities. Gov't. Exh. 4 at 19.<sup>5</sup> The investigation is a

23 <sup>4</sup> A separate evidentiary hearing was held for co-defendant William Perez's Motion to Suppress.

24 <sup>5</sup> In citing Government Exhibit 4, the page number used by the court is the handwritten page number located on the lower right corner of each page.

The court notes that Defendant Ho submitted Exhibits A.1 and A.2. These exhibits contain some of the reports in

1 collaborative effort involving three other agencies: IRS, FBI, and Drug  
2 Enforcement Administration (“DEA”). Gov’t. Exh. 4 at 1, 10, and 19. “The FBI  
3 and IRS requested NCIS assistance in verifying the allegations pertaining to the  
4 illegal operation of the MGM Spa.” Gov’t. Exh. 4 at 23.

- 5 • Criminal intelligence was obtained from various NCIS and DEA sources,  
6 involving illegal gambling activities at MGM Spa and illegal narcotics at MGM  
7 Spa and Club Crazy Horse, both of which are frequented by U.S. Navy and Air  
8 Force personnel. Gov’t. Exh. 4 at 1, 10 and 22.
- 9 • The NCIS investigation pertains to suspected violations of Title 21 U.S.C. § 841,  
10 21 U.S.C. § 1907, and Article 112A Uniform Code of Military Justice. NCIS also  
11 noted that additional Guam Annotated Offenses may also pertain. Gov’t. Exh. 4 at  
12 1 and 23.
- 13 • May 16, 2010 – Surveillance was conducted. NCIS noted two (2) vehicles  
14 registered to active Navy personnel parked in the MGM parking lot. Gov’t. Exh. 4  
15 at 2 and 11.
- 16 • May 24, 2010 – NCIS received photographs of active Navy personnel, LS Phoung  
17 Thuy Bosque and PO1 Michael Ryan Barton. Gov’t. Exh. 4 at 3. The photographs  
18 with related biographic information were from the Defense Manpower Data  
19 Center in Arlington, VA. Bosque and Barton’s vehicles were parked at the MGM  
20 Spa on May 16, 2010. Gov’t. Exh. 4 at 3.
- 21 • June 22, 2010 – NCIS interviewed LS2 Bosque regarding the observation of her  
22 vehicle in the parking lot of MGM. Gov’t Exh. 4 at 2 and 11. *See also* Gov’t. Exh.  
23 4 at 6.
- 24 • June 30, 2010 – Cooperating Witness (“CW”) was interviewed. CW stated that  
illegal gambling is conducted at MGM Spa and that money is delivered to Club  
Crazy Horse. Gov’t. Exh. 4 at 2 and 11. Club Crazy Horse is owned by Defendant  
Ho. Def. Ho Exh. B.
- September 28, 2010 –
  - NCIS Special Agent Hwang conducted surveillance of the MGM Spa.  
Gov’t. Exh. 4 at 12. While conducting surveillance, several vehicles  
parked in the MGM Spa parking lot were noted with Department of  
Defense (“DoD”) stickers, which allow military base access. Gov’t. Exh. 4  
at 23. After conducting a check, it was determined that several vehicles  
belonged to DoD contractors as well as military members. Gov’t. Exh. 4 at  
23.

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Government Exhibit 4. Since Government Exhibit 4 is the complete set of NCIS-related reports, the court will cite to Government Exhibit 4 instead of Defendant Ho Exhibits A.1 and A.2.

1           ○ An NCIS agent, acting in a shallow undercover capacity, was introduced  
2 to an individual outside of MGM Spa (described as doorman/security  
3 guard), smoking a cigarette emitting a scent of marijuana. Gov't. Exh. 4 at  
4 16, 19 and 23. The individual offered the agent some of the suspected  
5 marijuana cigarette but the agent declined. Gov't. Exh. 4 at 19 and 23. The  
6 agent then entered the MGM Spa game room and paid the entrance fee  
7 from FBI operational funds. Gov't. Exh. 4 at 15 and 19. The agent  
8 confirmed illegal gambling activities in the MGM Spa but did not observe  
9 any additional narcotics use and/or distribution. Gov't. Exh. 4 at 23. Also  
10 with the agent was an NCIS Confidential Human Source ("CHS"). Gov't.  
11 Exh. 4 at 15. A concealed video recording device was used to record any  
12 illegal activities occurring inside the MGM Spa. Gov't. Exh. 4 at 15. *See*  
13 *also* Gov't. Exh. 4 at 21 ¶ 2, and at 23 ¶ 3.

8           • September 29, 2010 –

9           ○ NCIS Special Agent Hwang conducted surveillance of the MGM Spa.  
10 Gov't. Exh. 4 at 13. The agent noted several vehicles parking in the MGM  
11 Spa parking lot with DoD stickers, which allow military base access.  
12 Gov't. Exh. 4 at 24. After conducting a check, it was determined that  
13 several vehicles belonged to DoD contractors as well as military members.  
14 Gov't. Exh. 4 at 24.

15           ○ An NCIS agent, acting in an undercover capacity, went to MGM Spa.  
16 Gov't. Exh. 4 at 17. *See also* Gov't. Exh. 4 at 21 ¶ 2 and at 23 ¶¶ 3-4. Also  
17 with the agent was an NCIS CHS. Gov't. Exh. 4 at 17. The agent observed  
18 approximately 20-30 individuals participating in the illegal gambling  
19 tournament, which comprised of both local civilians and military  
20 members. Gov't. Exh. 4 at 23. Some individuals in the room described  
21 themselves as Military Sea Lift Command employees, and active and  
22 former U.S. Navy personnel. Gov't. Exh. 4 at 25. No narcotics use and/or  
23 distribution was observed. Gov't. Exh. 4 at 23. The NCIS agent  
24 "participated in an undercover capacity to assist the FBI and IRS in  
verifying illicit gambling was taking place." Gov't. Exh. 4 at 25. The FBI  
provided the funds used by the agent and the NCIS CHS for gambling.  
Gov't. Exh. 4 at 17. A concealed video recording device was also used to  
record any illegal activities occurring inside the MGM Spa. Gov't. Exh. 4  
at 17.

21           • December 2, 2010 – FBI provided money from its operational funds to an NCIS  
22 undercover agent and CHS. Gov't. Exh. 4 at 27. A concealed video recording was  
23 used to record any illegal activities occurring inside the MGM Spa. Gov't. Exh. 4  
24 at 27.

23           • December 14, 2010 –

- NCIS agents interviewed three civilians at the MGM Spa. They were Kristin P. Guerrero, Linda Billeter and Jennie Pau. *See* Gov't. Exh. 4 at 29-32.
- FBI Special Agent Runles interviewed Defendant Ho in the presence of NCIS Special Agent Twilley at the MGM Spa. *See* Def. Ho Exh. B.
- FBI Special Agent Runles interviewed co-defendant William Perez in the presence NCIS Special Agent Twilley at the MGM Spa. *See* Def. Ho Exh. C.
- FBI Special Agent Christopher D. Jones interviewed USN Petty Officer 1st Class Dareem Taurean Potter at the MGM Spa. Potter has admitted to playing cards at the MGM Spa. *See* exhibit attached to Gov't. Response, ECF No. 181.
- December 15, 2010 – NCIS Special Agent Twilley, IRS Special Agent Peterson, FBI Special Agent Michael Gadsden and FBI Special Agent Runles followed Defendant Ho to Club Crazy Horse to execute a “Consent to Search” form, signed by Defendant Ho. *See* Def. Ho Exh. B, D and E. The Consent Form is from the NCIS. *See* Def. Ho Exh. E. The form states that the NCIS is conducting an investigation into fraud. *See* Def. Ho Exh. E. The form was signed by Defendant Ho, NCIS Special Agent Twilley and FBI Special Agent Runles. *See* Def. Ho Exh. E.
- December 17, 2010 – FBI Special Agent Runles along with NCIS Special Agent Twilley, met with co-defendant William Perez at the MGM Spa to return the keys of the building and for additional interview. *See* Def. Ho Exh. F.
- January 20, 2011 – IRS Special Agent Peterson, along with NCIS Special Agent Twilley and FBI Special Agent Runles, conducted an interview of William Fejeran at the FBI Office. Def. Ho Exh. G.

During the evidentiary hearings held in December 2012, IRS Special Agent Peterson opined that he believes NCIS only played a supporting role to IRS and FBI. This opinion was based on the greatly decreased involvement of NCIS after the execution of the search warrant on December 14, 2010. Also, it was the FBI with the assistance of IRS who secured the search warrant for the MGM Spa. NCIS did not secure any search warrant or write any affidavits in support of any search warrant. NCIS only contributed information that was jointly used with information from other agencies to establish probable cause. NCIS's particular interest was to

1 determine if service members were involved in any illegal activity. In the related cases<sup>6</sup> that  
2 resulted from the joint investigation, NCIS played no part of it.

3 IRS Special Agent Peterson also testified that Air Force Office of Special Investigations  
4 (“AF OSI”) was present at the Royal Orchid hotel lobby to provide security and outside  
5 perimeter type of work on the night of December 14, 2010. AF OSI was neither involved in the  
6 investigation itself nor in the actual execution of the search warrant inside Paradise Bingo. IRS  
7 Special Agent Peterson was unable to confirm with certainty whether or not AF OSI also  
8 provided security at Isla Bingo in Compadres Mall (“I also *believe* they [AF OSI] were outside  
9 the Compadres Mall Isla Bingo location.”).

## 10 II. DISCUSSION

11 The Posse Comitatus Act provides in its entirety the following:

12 Whoever, except in cases and under circumstances expressly authorized by  
13 the Constitution or Act of Congress, willfully uses any part of the Army or the  
14 Air Force as a posse comitatus or otherwise to execute the laws shall be fined  
15 under this title or imprisoned not more than two years, or both.

16 18 U.S.C. § 1385. Although the Posse Comitatus Act was initially applicable only to the Army  
17 and the Air Force, it was later extended to the Navy pursuant to 10 U.S.C. § 375. *See United*  
18 *States v. Khan*, 35 F.3d 426, 431 (9th Cir. 1994); *United States v. Chon*, 210 F.3d 990, 993 (9th  
19 Cir. 2000). In its entirety, 10 U.S.C. § 375 provides the following:

20 The Secretary of Defense shall prescribe such regulations as may be necessary  
21 to ensure that any activity (including the provision of any equipment or  
22 facility or the assignment or detail of any personnel) under this chapter does  
23 not include or permit direct participation by a member of the Army, Navy, Air  
24 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.

10 U.S.C. § 375. Department of Defense (DoD) Directive No. 5525.5 (Jan. 15, 1986)

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<sup>6</sup> The related cases include the asset forfeiture of \$118,000, the 14 postal money orders, and the condominium in Irvine, California.

1 (<http://www.dtic.mil/whs/directives/corres/pdf/552505p.pdf>) was issued governing DoD's  
2 cooperation with civilian law enforcement officials. The Navy is prohibited from directly  
3 assisting civilian law enforcement officers in "a search or seizure" and the "use of military  
4 personnel for surveillance or pursuant of individuals or as undercover agents, informants,  
5 investigators, or interrogators." DoD Directive No. 5525.5, E4.1.3.2 and E4.1.3.4. However,  
6 direct assistance is permissible on "[a]ctions that are taken for the primary purpose of furthering  
7 a military or foreign affairs function of the United States, regardless of incidental benefits to  
8 civilian authorities,"<sup>7</sup> which may include the following: (1) investigations and other actions  
9 related to enforcement of the Uniform Code of Military Justice;<sup>8</sup> (2) investigations and other  
10 actions that are likely to result in administrative proceedings by the Department of Defense,  
11 regardless of whether there is a related civil or criminal proceeding, or in matters which the  
12 Departments of Defense and Justice both have an interest;<sup>9</sup> (3) protection of DoD personnel,  
13 DoD equipment, and official guests of the Department of Defense;<sup>10</sup> and (4) such other actions  
14 that are undertaken primarily for a military or foreign affair's purpose.<sup>11</sup>

15 In addition, the following forms of indirect assistance are not restricted by the Posse  
16 Comitatus Act: "[t]ransfer of information acquired in the normal course of military operations"<sup>12</sup>  
17 and "[s]uch other actions . . . that do not subject civilians to use military power that is regulatory,  
18 prescriptive, or compulsory."<sup>13</sup>

19 **A. There is No Authority to Support a Motion to Dismiss for a Violation of the**  
20 **Posse Comitatus Act.**

21 Defendant Ho moves to dismiss the indictment on the ground that the Government has

22 <sup>7</sup> DoD Directive No. 5525.5, E4.1.2.1

23 <sup>8</sup> DoD Directive No. 5525.5, E4.1.2.1.1

24 <sup>9</sup> DoD Directive No. 5525.5, E4.1.2.1.2

<sup>10</sup> DoD Directive No. 5525.5, E4.1.2.1.5

<sup>11</sup> DoD Directive No. 5525.5, E4.1.2.1.6

<sup>12</sup> DoD Directive No. 5525.5, E4.1.7.1

<sup>13</sup> DoD Directive No. 5525.5, E4.1.7.2

1 violated the Posse Comitatus Act. *See* Motion, ECF No. 155. Specifically, Defendant Ho cites to  
2 the participation of NCIS agents in the investigation of this case, to include use of NCIS  
3 confidential informant, NCIS surveillance over civilians at civilian locations, use of NCIS  
4 undercover agent in the collection of evidence, participation of NCIS agents in the execution of  
5 the search warrant and seizure of evidence at the MGM Spa and Paradise Bingo, use of an NCIS  
6 consent to search form on Defendant Ho, interrogation of Defendant Ho and other civilians, and  
7 participation of an NCIS agent in executing the consent to search form at the Club Crazy Horse.  
8 *See* Reply, ECF No. 175 at 7; and Suppl. Brief, ECF No. 251.

9 For purposes of the motion to dismiss, the court will not delve into the merits of the  
10 Defendant's arguments because there is no authority to support a motion to dismiss for a  
11 violation of the Posse Comitatus Act. The statute clearly states that violation of the act shall be  
12 remedied either by a fine, a term of imprisonment, or both—not dismissal of an indictment. *See*  
13 18 U.S.C. § 1385. More importantly, the controlling case law from the Ninth Circuit is clear:  
14 violations of the Posse Comitatus Act or 10 U.S.C. § 375 do not warrant dismissal of the  
15 indictment. *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986), abrogated on other  
16 grounds by *Khan*, 35 F.3d 426 (9th Cir. 1994). *See also United States v. Cotten*, 471 F.2d 744,  
17 749 (9th Cir. 1973) (court denied the motion to dismiss based on an alleged violation of the  
18 Posse Comitatus Act because “[t]he remedy requested exceeds that required by the conduct.”).

19 Defendant Ho has not provided any such authority that would allow this court to even  
20 consider dismissal of an indictment for a violation of the Posse Comitatus Act, and there is  
21 nothing on the face of the statute to support the position that a violation warrants dismissal of an  
22 indictment.

23 **B. The Application of the Exclusionary Rule is Not Warranted.**

24 In the alternative, Defendant Ho moves to suppress the evidence obtained from NCIS

1 activities. *See* Reply to Motion to Dismiss, ECF No. 175 at 1; and Reply to Motion to Suppress,  
2 ECF No. 158 at 5-6. As discussed *supra*, the exclusive remedies under the Posse Comitatus Act  
3 are a fine, a maximum of two years imprisonment, or both. *See* 18 U.S.C. § 1385. The statute  
4 does not call for suppression of the evidence as one of the remedies. However, in *Roberts*, the  
5 Ninth Circuit found that an exclusionary rule may be appropriately imposed where there is  
6 “widespread and repeated violations” of the Posse Comitatus Act and there is a need to deter  
7 future violations. 779 F.2d at 568. *See also Hayes v. Hawes*, 921 F.2d 100, 104 (7th Cir. 1990)  
8 (the court notes that majority of the courts “have steadfastly refused to apply the exclusionary  
9 rule to evidence seized in violation of [the Posse Comitatus Act] . . . absent widespread and  
10 repeated violations”); *United States v. Al-Talib*, 55 F.3d 923, 930 (4th Cir. 1995); *United States*  
11 *v. Walden*, 490 F.2d 372, 377 (4th Cir. 1974); *United States v. Hartley*, 796 F.2d 112, 115 (5th  
12 Cir. 1986); *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988).

13 Defendant Ho contends that NCIS violated the Posse Comitatus Act because NCIS was  
14 directly involved in the execution of the civilian laws of the United States and there was “[n]o  
15 independent or primary military purpose, or foreign affairs objectives, [that] justified NCIS’s  
16 actions.” *See* Reply, ECF No. 175 at 7; and Suppl. Brief, ECF No. 251 at 7. Although not  
17 initially argued by Defendant Ho in his Motion to Dismiss, he now claims widespread and  
18 repeated violations of the Posse Comitatus Act. *See* Suppl. Brief, ECF No. 251. Specifically,  
19 Defendant Ho contends that the “NCIS investigative actions were widespread and repeated  
20 occurring on at least May 12, 2010, May 16, 2010, May 24, 2010, June 22, 2010, June 30, 2010,  
21 September 28, 2010, September 29, 2010, and September 30, 2010; and then during the  
22 December 14, 2010 and December 15, 2010 raids at MGM Spa, Paradise Bingo, Isla Bingo,  
23 Crazy Horse; and then at civilian locations thereafter, for follow up interviews with civilian  
24 witnesses or targets.” *Id.* at 3-4.

1 As noted *supra*, the Posse Comitatus Act provides an exception for “circumstances  
2 expressly authorized by the Constitution or Act of Congress.” 18 U.S.C. § 1385. Subsequent  
3 legislation also makes an exception for direct participation by the Navy if participation is  
4 “otherwise authorized by law.” 10 U.S.C. § 375. Regulations were adopted pursuant to federal  
5 statute authorizing direct military participation. *See* DoD Directive 5525.5. The directive permits  
6 direct assistance for “the primary purpose of furthering a military . . . function of the United  
7 States . . .” which may include investigations and other actions related to enforcement of the  
8 Uniform Code of Military Justice, investigations and other actions that are likely to result in  
9 administrative proceedings by the Department of Defense, and protection of DoD personnel. *See*  
10 DoD Directive 5525.5, E4.1.2. *See also Chon*, 210 F.3d at 994 (permits direct military assistance  
11 to execute civilian laws if it is an independent military purpose, citing to DoD Directive 5525.5).

12 Based on a thorough review of the exhibits submitted by the Government and Defendant  
13 Ho, and after consideration of the testimony presented during the evidentiary hearings held on  
14 December 5, 2012 and December 11, 2012, the court finds that the actions taken by the NCIS  
15 was for “the primary purpose of furthering a military . . . function of the United States.”  
16 Specifically, NCIS initiated an investigation due to criminal intelligence obtained from NCIS  
17 and DEA sources, involving illegal gambling activities at MGM Spa and illegal narcotics at  
18 MGM Spa and Club Crazy Horse, both of which are frequented by U.S. Navy and Air Force  
19 personnel. *See* Gov’t. Exh. 4 at 1, 10 and 22. NCIS reports state that its investigation pertains to  
20 suspected violations of Article 112 Uniform Code of Military Justice (wrongful use, possession,  
21 etc. of controlled substance), 21 U.S.C. § 841, 21 U.S.C. § 1907, and Guam laws. *See* Gov’t.  
22 Exh. 4 at 1 and 23. As such, NCIS has an independent interest in investigating Navy personnel  
23 who may be engaged in illegal activities at the MGM Spa and Club Crazy Horse. *See Applewhite*  
24 *v. U.S. Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993) (the military may investigate illegal drug

1 transactions by active duty military personnel). Therefore, NCIS's activities related to the  
2 investigation of the MGM Spa and Club Crazy Horse since May 2010 are not in violation of the  
3 Posse Comitatus Act.

4 The court does not find repeated and widespread violations of the Posse Comitatus Act on  
5 the dates listed by Defendant Ho in his supplemental brief because as discussed above, NCIS has  
6 an independent military purpose in investigating allegations of Navy personnel involved in  
7 illegal gambling and illegal narcotics activities at MGM Spa and Club Crazy Horse.<sup>14</sup>

8 Defendant Ho argues that there was no military belief that its personnel were participating  
9 in illegal activities at Paradise Bingo and Isla Bingo, yet NCIS and AF OSI participated in the  
10 execution of the search warrant on December 14, 2010 and December 15, 2010. *See* Suppl. Brief,  
11 ECF No. 251. Moreover, Defendant Ho questions that the NCIS "consent to search" form was  
12 used for Club Crazy Horse, which states that NCIS is conducting an investigation into "fraud"  
13 when "there was no military fraud investigation that was ongoing." *See* Suppl. Brief, ECF No.  
14 251 at 2.

15 It is unnecessary for this court to determine whether the Posse Comitatus Act was violated  
16 in these three instances<sup>15</sup> because assuming without deciding that there was a violation, the  
17 application of an exclusionary rule is not warranted. These instances do not amount to "repeated  
18 and widespread" violations of the Posse Comitatus Act.

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21 <sup>14</sup> During its investigation since May 2010, NCIS noted vehicles registered to active military personnel parked in the  
22 MGM Spa. After surveillance and undercover work, NCIS confirmed illegal gambling at the MGM Spa and an  
23 incident when the undercover agent was offered suspected marijuana cigarette. NCIS also confirmed presence of  
24 active military personnel in the MGM Spa. On the night of December 14, 2010, when the search warrant was  
executed at MGM Spa, an active Navy personnel admitted to engaging in illegal gambling.

<sup>15</sup> The three instances are military participation at (1) Paradise Bing, (2) Isla Bingo, and (3) the issue of the NCIS  
"consent to search" form noting "fraud" as the purpose of the investigation. The court's use of "participation" in the  
prior sentence does not mean direct or indirect participation. The court need not make this determination as it finds  
that there is no widespread and repeated violations of the Posse Comitatus Act.

1           **III. CONCLUSION**

2           Based on the discussion above, the court hereby **DENIES** Defendant Ho's Motion to  
3 Dismiss or in the alternative, Motion to Suppress.

4           **SO ORDERED.**



6           /s/ Frances M. Tydingco-Gatewood  
7           Chief Judge  
8           Dated: Jan 22, 2013

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