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Abstract
of
THE POSSE COMITATUS ACT:
A STUDY OF RESTRICTIONS
ON MILITARY ENFORCEMENT OF CIVIL LAW

(a 125 pg. thesis)

by

Ronald Drugan Robertson Nance

Captain, USAF

M.A., California State University, Sacramento (1984)

Statement of Problem

— Military personnel are restrained from assisting in the enforcement of civil law by the Posse Comitatus Act. Violators may be subjected to a \$10,000 fine and/or two years in prison.

Military commanders, operations officers, and chiefs of police, routinely have to make decisions on the use of their personnel which may violate this law and place them in jeopardy of prosecution. Without a thorough knowledge of the authorizations and prohibitions of the Posse Comitatus Act, this jeopardy is increased.

No single-source reference is provided to guide military personnel in making the decisions, therefore, incorrect decisions may be made either providing unlawful assistance or denying authorized assistance. This thesis provides comprehensive lists of authorizations and

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THE POSSE COMITATUS ACT:
A STUDY OF RESTRICTIONS
ON MILITARY ENFORCEMENT OF CIVIL LAW

Ronald Drugan Robertson Nance
B.S., Lambuth College, Jackson, Tennessee

THESIS

Submitted in partial satisfaction of
the requirements for the degree of

MASTER OF ARTS

in

CRIMINAL JUSTICE

at

CALIFORNIA STATE UNIVERSITY, SACRAMENTO

Summer
1984

THE POSSE COMITATUS ACT:
A STUDY OF RESTRICTIONS
ON MILITARY ENFORCEMENT OF CIVIL LAW

A Thesis

by

Ronald Drugan Robertson Nance

Approved by:

_____, Chair
James M. Poland, Ph.D.

_____, Second Reader
Thomas R. Phelps, Ph.D.

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Department of Criminal Justice

Abstract
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THE POSSE COMITATUS ACT:
A STUDY OF RESTRICTIONS
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Military commanders, operations officers, and chiefs of police, routinely have to make decisions on the use of their personnel which may violate this law and place them in jeopardy of prosecution. Without a thorough knowledge of the authorizations and prohibitions of the Posse Comitatus Act, this jeopardy is increased.

No single-source reference is provided to guide military personnel in making the decisions, therefore, incorrect decisions may be made either providing unlawful assistance or denying authorized assistance. This thesis provides comprehensive lists of authorizations and prohibitions which may be used to make those decisions.

Sources of Data

The data collected in this thesis were taken from court decisions, U.S. Attorney General opinions, military Judge Advocate General opinions, government documents, books, journals, letters, and interviews.

Conclusions Reached

Although the Posse Comitatus Act seems straight forward in it's prohibitions, court decisions, legal opinions, and legislation have resulted in twice the number of specific authorizations than prohibitions. A list of these authorizations and prohibitions should be provided by the military sevices to the personnel who make such decisions. This will provide some degree of protection from personal liability for violating Posse Comitatus and may also be beneficial in increasing the protection provided by civil law enforcement. The military services should update these lists annually to remain current with the decisions of the courts.

Approved: _____, Committee Chair

James M. Poland, Ph.D.

PREFACE

This study has served a dual purpose. Of course, it has served as the concluding labor in the quest for receiving a Master of Arts degree in Criminal Justice, but more importantly, it has provided a plethora of information for me to use in my chosen profession as an Air Force officer.

I decided to study this subject as a result of my experiences as an Air Force Security Police operations officer. I realized my knowledge about the Posse Comitatus Act was lacking, and in my discussions with other security police officers, it was evident they also lacked knowledge on the subject.

I hope the information in this study of the Posse Comitatus Act will serve as a basis for the Air Force to provide similar official information to it's personnel.

ACKNOWLEDGMENTS

This work would not have been possible without the assistance and guidance of several people:

First, I must recognize the love and patience of my wife Johnnie and our two sons, Ronnie and Steven. They have been neglected and have certainly suffered from my ill temper when preparation of this thesis wasn't going as planned. Through all of the work, they stood behind me and urged me to continue. Without them, I would never have been able to complete this work.

Next, Dr. James M. Poland, my thesis chair, who provided the guidance for researching and assembling the thesis.

Dr. Thomas R. Phelps, my second reader and Graduate Coordinator, who urged me to undertake this study of Posse Comitatus when he learned of my interest in the subject. His positive attitude about this work has kept me going when I've gotten depressed and would have probably given up.

Finally, I would like to express my gratitude to the United States Air Force for selecting me to attend CSUS under the Air Force Institute of Technology program.

TABLE OF CONTENTS

| | Page |
|---|------|
| PREFACE | vi |
| ACKNOWLEDGEMENTS | vii |
| Chapter | |
| 1. INTRODUCTION | 1 |
| The Posse Comitatus Act | 1 |
| Applicability | 7 |
| Need | 9 |
| Purpose | 10 |
| Definition of Terms | 11 |
| Overview of the Remainder of the Thesis | 12 |
| Notes | 14 |
| 2. LITERATURE REVIEW | 16 |
| Introduction | 16 |
| Non-regulatory Literature | 16 |
| Military Regulations | 27 |
| Summary | 31 |
| Notes | 33 |

| | | |
|----|--|-----|
| 3. | BINDING DECISIONS RELATING TO POSSE COMITATUS | 38 |
| | Introduction | 38 |
| | Civil/Military Court Decisions | 38 |
| | United States Attorney General/Military Judge Advocate Opinions | 79 |
| | Department of Defense Appropriations Act of 1982 | 87 |
| | Summary | 89 |
| | Notes | 92 |
| 4. | SUMMARY AND CONCLUSIONS | 99 |
| | Summary | 99 |
| | Non Violative Military Assistance | 100 |
| | Violative Military Assistance | 108 |
| | Conclusions | 112 |
| | Need For Further Study | 112 |
| | Notes | 114 |
| | BIBLIOGRAPHY | 121 |

CHAPTER ONE

Introduction

The Posse Comitatus Act is a constraint placed by Congress on the use of military personnel to assist with civilian law enforcement. According to this constraint, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both."¹

Before attempting to learn what activities are authorized to military personnel assisting civilian law enforcement, the reader should first have a basic understanding of the Posse Comitatus Act and the events which led to its passage.

The Posse Comitatus Act

The term posse comitatus ... the entire population of a county, above the age of 15, from whom the sheriff may draw to aid him in the execution or enforcement of the law.²

The Posse Comitatus Act is a result of the Civil War. In 1865, with the end of that conflict, the victorious

North implemented programs for "Reconstruction" of the South. As a result of the reconstruction programs, the defeated southern states were saturated with "carpetbaggers" and federal occupation troops. The "carpetbaggers" were businessmen selected by northern politicians to come south and govern the rebel states during their reconstruction. As political appointees over a defeated nation, they held nearly limitless power over southern citizens. In the South, this was viewed as a denial of the basic right to self-government.³ The "carpetbaggers", through their excesses, greed, and corruption, left a legacy in the South. Even today, many Southerners associate the term "carpetbagger" with a dishonest politician whose primary concern is his own well-being.

The dominance of southern political affairs might have been swiftly overturned through the election process. However, there was extensive use of federal troops to support and ensure survival of the carpetbagger governments.⁴ Troops were used in a variety of ways which were seen as overt attempts by northern politicians to subvert the natural evolution of southern (usually Democratic) politics. Although responsible Southerners conceded an initial necessity for occupation troops to return the South to normality following the war, the

extended (12 year) occupation was seen as excessive. In addition, the use of occupation troops as a posse comitatus to collect taxes, monitor and police elections, and control the southern political process (the Louisiana State Legislature was thrice invaded and legislators harrassed) did nothing to ease post war tensions.⁵

Eleven years after the end of the Civil War, the Democratic party had gained political control of all but three of the southern states. In those three, South Carolina, Florida, and Louisiana, the political fighting between Democrats and Republicans was particularly bitter. During the 1876 presidential election, the rival parties accused each other of fraud and intimidation of voters in each of these states. As a result of the political rivalry, two sets of election certificates were sent to Congress. Each party had certified its own set of certificates, thereby placing the presidential election results for those states in question.⁶ As a result of the dual certificates, the closely contested presidential election could not be immediately decided. No one knew whether Rutherford B. Hayes (Republican) or Samuel J. Tilden (Democrat) had been elected President of the United States. The election hung on the nineteen electoral votes from South Carolina, Florida, and Louisiana. A special fifteen member Congressional committee was established to

resolve the dispute and award the electoral votes to the rightful winner of each vote. The committee was composed of seven Democrats and seven Republicans, with the swing vote belonging to a pro-Republican. In order to be elected President, Tilden needed only one of the nineteen votes in question. He received none, and Hayes became President. Southern Democratic politicians in Congress were furious and the first attempt to remove occupation troops from availability as a posse comitatus was submitted as a rider to the Army Appropriations Bill before the House of Representatives. With voting following party lines, this first proposal was deadlocked and Congress adjourned the session without passing the appropriations bill.⁷

The three previously discussed situations, "carpetbaggers", federal occupation troops in the south for 12 years, and the defeat of Tilden in a hotly contested election, combined with the resentment from the Civil War to form the catalyst for passage of the Posse Comitatus Act by the 45th Congress in 1878.⁸ Although once repealed in order to move it from Title 10 of the United States Code to Title 18 of the United States Code, the Posse Comitatus Act has remained virtually unchanged for 105 years.⁹ The original version passed in 1878 read as follows:

From and after passage of this act it shall not be lawful to employ any part of the Army of

the United States as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress: and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section: and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding \$10,000 or imprisonment not exceeding two years, or by both such fine and imprisonment.¹²

As mentioned earlier, there have been virtually no significant changes to the original Posse Comitatus Act since its enactment in 1878. There was one significant oversight to the original version, plus some minor changes, of which the reader should be aware, however.

The significant oversight centers around the exclusion of the Navy from inclusion under Posse Comitatus. In the two unsuccessful versions submitted before the original Posse Comitatus Act was finally passed, the Navy had been specifically identified by name. There is some speculation that the Navy was deleted from the version which finally

passed because the proposal was a rider to an Army appropriations bill.¹¹ No matter what the reason, the Navy has never been added to the wording of the Posse Comitatus Act. Additionally, the Navy's sister service under the Department of the Navy, the Marine Corps, has never been included and is not legally bound by the constraints of Posse Comitatus. It should be noted that the Navy and Marine Corps place constraints upon themselves through Naval and Marine Corps Regulations which fulfill the intent of the restrictions imposed by the Posse Comitatus Act.

A minor change to the Posse Comitatus Act came about as a result of the creation of the United States Air Force as a separate branch of the military in 1947. Prior to 1947, the Air Force was the Army Air Corps, a part of the Army, and was included under the provisions of Posse Comitatus. From 1947 until 1956, there were no changes made to bring the new branch under the provisions of Posse Comitatus. On August 10, 1956, the Posse Comitatus Act was amended to include the Air Force.¹²

The most significant change to the restraints of the Posse Comitatus Act was the passage of Public Law 97-86, The Department of Defense Authorization Act of 1982. This law, which does not change the actual Posse Comitatus Act in Title 18, is a new chapter which was added to Title 10

of the United States Code and will be addressed at length in chapter three.¹³

Having completed a brief Posse Comitatus history lesson, one final area must be covered before proceeding. The reader should know to whom the Posse Comitatus Act is applicable.

Applicability

In his 1960 article entitled "Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act", Major H. W. C. Furman identified the Posse Comitatus Act as applicable in the following manner:¹⁴

1. Regular Army
 - Applies to active duty personnel.
 - Does not apply to retired personnel.
2. Army Reserve
 - Applies only while on active duty.
3. Army National Guard
 - Applies while on federal active duty.
 - Does not apply while on state active duty.
4. Army Cadets
 - Applies to West Point cadets.
 - Does not apply to Army R.O.T.C. cadets.
5. Regular Air Force
 - Applies to active duty personnel.

Does not apply to retired personnel.

6. Air Force Reserve

Applies only while on active duty.

7. Air National Guard

Applies while on federal active duty.

Does not apply while on state active duty.

8. Air Force Cadets

Applies to Air Force Academy cadets.

Does not apply to Air Force R.O.T.C. cadets.

9. Regular Navy

Does not apply.

10. Navy Reserve

Does not apply.

11. Navy Cadets

Does not apply.

12. Regular Marine Corps

Does not apply.

13. Marine Corps Reserve

Does not apply.

14. Regular Coast Guard

Does not apply.

15. Coast Guard Reserve

Does not apply.

16. Coast Guard Cadets

Does not apply.

17. Civilian Auxillary Police Employed by Military
Does not apply.
18. Other Civilians Employed by Military.
Does not apply.

Need

United States Air Force commanders, chiefs of security police, and security police operations officers routinely determine the operational use of those personnel assigned to their units. The decisions these officers make may encroach upon the prohibitions of the Posse Comitatus Act, thereby placing them in a position of risking personal liability in the form of a \$10,000 fine, two years in prison, or both, for an error in military judgment. This risk may be heightened by two factors: varied civil and military jurisdictions within base boundaries, and a lack of knowledge of established precedents relating to the Posse Comitatus Act.

In addition to the risk of personal liability under the law, a second undesirable situation arises from a lack of knowledge of the precedents established relating to the Posse Comitatus Act. This results when civilian authorities need and request legally authorized military assistance but do not receive it, or do not receive it in a timely manner. This may occur when cautious military

personnel either refuse for fear of violating the Posse Comitatus Act or delay a decision while awaiting legal counsel from their local judge advocate. These incorrect decisions and delays may jeopardize important law enforcement operations.¹⁵

Currently, there is no Department of the Air Force guidance provided to field officers which gives definitive "thou shall or shall not" information. Furthermore, the Judge Advocate General of the Air Force does not provide a single source reference for local judge advocates to use in providing counsel regarding the Posse Comitatus Act. Each query must be separately researched and interpreted before an authorization is granted or denied.¹⁶ If such a reference were available, its use could not only provide some degree of protection to field officers making operational decisions, but could also speed the decision process relative to aiding civilian law enforcement.

Purpose

The purpose of this thesis is to provide a review of the Posse Comitatus Act and related legal precedents, legislative precedents, Attorney General opinions, and Judge Advocate General opinions. From this review, a listing will be compiled of examples of both authorized and unauthorized uses of military personnel to assist civilian

law enforcement. This information may then be used by both field officers and local judge advocates to speed the decision process regarding military assistance requests from civilians.

Definitions and Terms

Throughout this thesis, the following nominal definitions are used:

Authorized use of military personnel-- use which has been identified by either civil court (at the highest level heard), military Judge Advocate/US Attorney General opinions or specifically addressed and interpreted by federal legislative bodies as being legal.

Unauthorized use of military personnel--use which has been identified by either civil court (at the highest level heard), military Judge Advocate/US Attorney General opinions or specifically addressed and interpreted by federal legislative bodies as being legal.

The terms "Posse Comitatus Act" and "Posse Comitatus" will be used interchangeably throughout this thesis and refer to the constraint mentioned in the first paragraph of this chapter. This thesis and the references to "Posse Comitatus" should not be interpreted by the reader as

referring to the Posse Comitatus tax protest organization, which is an ultraconservative radical organization active in the Midwest United States. This organization vigorously opposes the income tax system and does not believe in paper money. They are anti-Semitic, racist, and insist on the right to bear arms publically at all times.¹⁷

Overview of the Remainder of the Thesis

This thesis is written in four chapters. In chapter two, a review of the literature (books and articles) exclusive of the civil court decisions, judge advocate opinions, and federal legislative interpretations, is given.

In chapter three, the civil court decisions are identified and a synopsis of each decision and its applicability to Posse Comitatus is given; the military Judge Advocate/US Attorney General opinions relative to Posse Comitatus are given; the federal legislative interpretations specifically addressing the Posse Comitatus Act as changed by Public Law 97-86 are addressed.

Finally, chapter four consists of a synthesis of the information contained in chapter three providing a summary of specific "thou shall, thou shall not" guidance relative to Posse Comitatus.

With an understanding of the above information, the reader should now be prepared for the in-depth review of literature relating to the Posse Comitatus Act which is presented in the next chapter.

NOTES

- ¹ United States Code of Federal Regulations, Title 18, Sec. 1385 (1970).
- ² Blacks Law Dictionary, s.v. "posse comitatus."
- ³ James P. O'Shaughnessy, "The Posse Comitatus Act: Reconstruction Politics Reconsidered," American Criminal Law Review 13 (1976): 703-10.
- ⁴ Ibid., P. 705.
- ⁵ Ibid., p. 706.
- ⁶ Ibid.
- ⁷ Ibid., pp. 708-9.
- ⁸ Ibid., pp. 703-7.
- ⁹ Major H.W.C. Furman, "Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act," Military Law Review 7 (1960): 85.
- ¹⁰ Ibid.
- ¹¹ Clarence L. Meeks III, "Illegal Law Enforcement: Aiding Civil Authorities in Violation of The Posse Comitatus Act," Military Law Review 70 (1975): 100-1.
- ¹² Furman, op. cit., p. 96.
- ¹³ U.S., Cong., House, Committee on Government Operations, Subcommittee on Government Information and Individual Rights, Military Assistance to Civilian Narcotics Law Enforcement: An Interim Report, Hearing, 97th Cong.,

2nd sess., 28 Sep. 1982. (Washington, D.C.: GPO, 1982),
p. 2.

¹⁴ Furman, op. cit., p. 99.

¹⁵ U.S., Cong., House, Committee on the Judiciary,
Subcommittee on Crime, Posse Comitatus Act, Hearing, 97th
Cong., 1st sess., 3 Jun. 1981. (Washington, D.C.: GPO,
1982), p. 12.

¹⁶ Telephone interview with James Green, Chief of
Civil Law, Office of the Staff Judge Advocate, Mather Air
Force Base, California, 22 May, 1984.

¹⁷ Gale Research Co., Encyclopedia of Associations,
vol.1, part 2, ed. Denise S. Akey, 18th ed. (Detroit: Book
Tower, 1984), p. 1221.

CHAPTER TWO

Literature Review

Introduction

In researching The Posse Comitatus Act, a surprising amount of literature is found, however, the vast majority is in the form of journal articles with published books on the subject being extremely difficult to find. Military regulations provide an insight to the subject from the hierarchy's point of view. These three sources, books, journal articles, and military regulations are reviewed in this chapter. Although technically falling within the category of literature, court decisions, legislative decisions, and Judge Advocate/US Attorney General opinions relating to Posse Comitatus are discussed separately in chapter three.

Non-regulatory Literature

Civilians Under Military Justice by Frederick Bernays Wiener provides the student of military juris prudence and the Posse Comitatus Act with an excellent background investigation to some of the underlying factors which preceeded the passage of Posse Comitatus but may have had a bearing on a commonly held belief stated by Engdahl:

Here then is one of the paramount principles... soldiers, needed and honored in war for the valor and strength that turns back the nation's enemies, are never to be used against their civilian countrymen, no matter how expedient their utilization may seem.¹

Although addressing a period in United States history prior to the passage of the Posse Comitatus Act, Wiener's study provides a startling revelation of the excesses which may occur in a police state such as the Colonies were during the Revolutionary War.² It becomes easy to see why Engdahl held the opinion stated above.

While unpublished, "The Administration of Military Installations: Some Aspects of the Commander's Regulatory Authority with Regard to the Conduct and Property of Civilians and Military Personnel" by Wyley E. Oliver, Jr., proves to be an excellent source for numerous references to military Judge Advocate opinions. Though admittedly dated and in need of being brought more current (prepared in 1958 for the U.S. Army's Judge Advocate General's School), a basic understanding of the military's authority over civilians on military installations can be gained through study of Oliver's thesis.³

Of all the literature reviewed in this chapter, H.W.C. Furman's "Restrictions Upon Use of the Army Imposed By the Posse Comitatus Act", provides the most closely related information to that intended by this thesis.⁴ Furman begins by giving the reader an overview of the history surrounding the passage of the Posse Comitatus Act in 1879, and why such legislation was originally enacted. He then gives the reader a thorough interpretation of Posse Comitatus and those to whom it is applicable. Finally, Furman provides a broad overview of general restrictions upon the military as a result of Posse Comitatus. This article, published in the Military Law Review in 1960, provides excellent examples along the lines of this study, however does not address the last 23 years of court decisions. Nevertheless, this article was cited by a number of judges in making their Posse Comitatus decisions.

In 1979, St. John's Law Review published an article by Deanne C. Siemer, Special Assistant to the Secretary and Deputy Secretary of Energy, and Andrew S. Effron, Staff Attorney, Office of General Counsel, Department of Defense, entitled "Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act". The major premise of this article is that the Posse Comitatus Act is worded in such a manner as to suggest it's restrictions are

unlimited and on a worldwide basis due to the worldwide mission of the military establishment. This, to Siemer and Efron, is contradictory since the traditional interpretation of a posse comitatus is applied to the males within the specific county who are needed by the sheriff. Siemer and Efron suggest the Posse Comitatus Act, therefore, neither addresses or denies extraterritoriality.⁵ This article examines case law, administrative practices, interpretations/opinions, and legislative history, in an attempt to make a determination of the extraterritoriality of the Posse Comitatus Act.

James P. O'Shaughnessy, in a note published in a 1976 edition of The American Criminal Law Review, entitled "The Posse Comitatus Act: Reconstruction Politics Reconsidered", examines the applicability of Posse Comitatus today.⁶ He observes that most of the problems which existed and in fact, spawned the passage of Posse Comitatus have disappeared. Based on this observation, O'Shaughnessy examines the various applications of the Posse Comitatus Act from its inception to present in an attempt to determine whether it should be repealed or modified to coincide with modern America. He notes that there has never been a criminal prosecution for violation of Posse Comitatus, but rather, it is primarily used as an appeal for suppression of evidence against defendants.⁷ Although

O'Shaughnessy concludes the Posse Comitatus Act is still viable in this day and time, he recommends several modifications which will allow certain leeway to use federal troops consistent with other federal statutes.⁸

"Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act" by Major Clarence I. Meeks III, is a superb article which addresses numerous violations of the Posse Comitatus Act.⁹ Meeks' conclusion offers specific recommendations to The Department of Defense (DoD) regarding its responsibilities to provide explicit guidance to subordinate commanders. Meeks contends this guidance is necessary in order to protect field commanders from prosecution under the Posse Comitatus Act.¹⁰

In 1968, Douglas A. Poe's article, "The Use of Federal Troops to Suppress Domestic Violence" was published in the American Bar Association Journal. Mr. Poe, while not specifically focusing on the Posse Comitatus Act, examines the legal basis for presidential directed federal intervention in situations involving domestic violence. This article examines the 1967 Detroit riots and the basis President Johnson used for dispatching federal troops to quell the rioting. Poe concludes that President Johnson delayed excessively in intervening because he chose the

wrong section of the U.S. Code under which to act. This article provides a thumbnail sketch of the President's authority to use troops without violating the constraints of Posse Comitatus.¹¹

Another article which addresses the President's authority to intervene with federal troops is George H. Faust's "The President's Use of Troops to Enforce Federal Law". Published in a 1958 edition of the Cleveland-Marshall Law Review, Faust's article provides an historical look at the events and legal decisions which have confirmed this authority. Faust also identifies arguments which claim the President's authority to use troops or militia to enforce federal law is removed by the Posse Comitatus Act. He points out that the wording of Posse Comitatus allows use of troops when "expressly authorized by the Constitution or acts of Congress" and Congress, through Title 10 of the U.S. Code, has given that authority to the President.¹²

Military Law Review printed "Extraterritorial Jurisdiction and Its Effect on the Administration of Military Criminal Justice Overseas", by Jan Horbaly and Miles J. Mullin. This examines proposed legislation to apply extraterritorial jurisdiction to federal law.¹³ Horbaly and Mullin discuss the necessity for such legislation and identify a major shortfall in the proposed

legislation. No provisions for enforcement of federal laws overseas are included in the proposal, therefore, Horbaly and Mullin suggest additional legislation or riders to the current proposal which will specifically identify such activity be authorized for military police and investigators. Such legislation, the authors contend, should override the Posse Comitatus Act only in those situations in which extritorial enforcement is applicable.¹⁴

Edward S. Corwin authored an article, published in the Political Science Quarterly, entitled "Martial Law, Yesterday and Today". This article is especially interesting in that it was published in 1932, examines the authority to declare martial law within The United States, and was written during a period in which martial law had been enacted in Kentucky, Idaho, Iowa, Texas, and Oklahoma.¹⁵ Although not specifically addressing Posse Comitatus, this article is viable and included in this literature review because declaration of martial law effectively nullifies the proscriptions levied by the Posse Comitatus Act. Corwin's article gives an excellent (although brief) historical overview of martial law and how it came to be exercised in The United States.¹⁶

In 1966, the Duke Law Journal published a comment entitled "Federal Intervention in the States for the

Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy". This article addressed the federal intervention during the late '50s and early '60s in Little Rock, Montgomery, "Ole Miss", The University of Alabama, Birmingham, and Selma. During each of these situations, federal troops were either used or alerted for dispatch under the authority of section 333 of Title 10 of the United States Code. The rationale and justification for these presidential decisions are discussed in this article.¹⁷

Perhaps the strongest stand against any use of military intervention in civilian law enforcement, riot, or disorder, is expressed by David E. Engdahl in his article, "Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders". Published in the Iowa Law Review, in 1971, Engdahl concludes this historical treatise with an impassioned denunciation of military might against fellow citizens. He likens the Kent State University riots and subsequent deaths of civilians to the "Boston Massacre" and implies a revolution similar to the American Revolution may be in it's infancy stages as a result.¹⁸ While this article was apparently written in the passion and anguish following Kent State, it still provides an excellent historical overview of the use of troops in quelling civil disturbances.

Major Stephen Nypaver III's article entitled "Issues Raised in the Prosecution of an Undercover Fence Operation Conducted by the US Army Criminal Investigation Command", was published in the April 1982 edition of The Army Lawyer. This article specifically addresses methods to be employed during a joint "sting" operation designed to identify both civilian and military thieves of government property. Nypaver's recommended procedures to avoid violations of Posse Comitatus include attempting to identify whether the suspects are military personnel or civilians before engaging in the actual transaction, then having military undercover agents engage in only those transactions involving military personnel. He is adamant that the operation should be controlled by civilian undercover agents anytime the suspect is believed to be civilian, thereby avoiding the appearance of Posse Comitatus violation.¹⁹

The Army Lawyer also published another Posse Comitatus article in 1983. This article, "Recent Developments Relating to the Posse Comitatus Act", by Major Robert E. Hilton, specifically addresses the changes to public law created by the passage of section 905 of the Department of Defense Authorization Act of 1982. This piece of legislation added Chapter 18 to Title 10 of the United States Code.²⁰ According to Hilton, Congress enacted

this legislation because of the threat created by the influx of drugs into the United States. This article identifies the purpose and actions now allowed by the military in assisting law enforcement agencies, other than those assigned to the Department of Defense, in drug interdiction. Hilton also suggests this recent legislation has clarified the intent of Congress with respect to the activities which should not be considered Posse Comitatus violations.²¹

Another highly informative piece of literature relating to the removal of restrictions of Posse Comitatus may be found in Report No. 97-921 submitted to the House of Representatives of the 97th Congress under the title Military Assistance to Civilian Narcotics Law Enforcement: An Interim Report. In this report from the Committee on Government Operations, the background to the passage of the aforementioned Department of Defense Authorization Act of 1982 is given. The specific authorizations are discussed and recommendations for loan of military equipment and surveillance systems are given.²² An interesting insight to the governmental process is revealed in Appendix A to this report which is a memorandum from Vice President George Bush to the Secretary of Defense, ordering the loan of equipment to the South Florida Task Force in combating drugs and "immediate" implementation of regulations to

subordinate commands authorizing their assistance.²³

An even more comprehensive knowledge of the Posse Comitatus Act may be garnered through study of the entire hearings before the House of Representatives Subcommittee on Crime evaluating the Department of Defense Authorization Act prior to its passage. These hearings, which were convened on June 3, 1981, are identified as Committee Serial No. 61 of the 97th Congress and may be requested through the Federal Depository Library. In these published committee minutes, the reader learns a great deal about the investigatory process involved in the passage of this legislation. Testimony, both for and against the liberalization of the proscriptions of the Posse Comitatus Act as presented, reveals many of the desires and fears of military, customs, and law enforcement personnel relating to the Posse Comitatus Act.²⁴ The appendix, which contains 14 items including correspondence, articles, and military regulations, provides a veritable treasure of information for the serious student of the Posse Comitatus Act.²⁵

Although not regulatory, and slightly outdated by recent enactment of the Department of Defense Appropriations Act of 1982, Air Force Pamphlet 110-3, Civil Law, provides local commanders with somewhat definitive guidance in chapter 16, "Civil Disturbances". This chapter

gives an historical overview of the Posse Comitatus Act and explains the President's authority to use military personnel in various situations, as authorized by the Constitution and federal statutes.²⁶ The specific guidance relative to the Posse Comitatus Act is less than one page in length and centers around a single test to determine the appropriateness of use of military personnel. The test given in this pamphlet is that a determination of whether military personnel are being asked to "execute" civil law must be made. If they are, then the use of military personnel should be avoided.²⁷

Military Regulations

The first regulation to be examined is Department of Defense Directive 5525.5, Department of Defense Cooperation with Civilian Law Enforcement Officials. This directive contains the basic policy guidelines for all branches of the federal military to follow when complying with the provisions of the Department of Defense Appropriations Act of 1982, regarding assistance to civilian law enforcement in drug interdiction.²⁸ The major enclosures to this directive address the use of information collected during military operations,²⁹ the use of military equipment and facilities,³⁰ and restrictions on participation of DoD personnel in civilian

law enforcement activities.³¹ Unfortunately, this directive is limited in scope to those areas directly concerned with the above mentioned legislation, and is not expanded to provide additional guidance.

Department of Defense Directive 3025.12, Employment of Military Resources in the Event of Civil Disturbances, provides broad uniform policies, assigns responsibilities, and gives general guidance for the use of military personnel in support of civil authorities in combating civil disturbances.³² This directive addresses the Posse Comitatus Act and gives four exceptions provided by Congress to allow the President to order federal troops into service enforcing civil law.³³ The remainder of this directive is devoted to delegating authority to various service secretaries, establishing reporting procedures, and delineating approval authority for various types of assistance requests.³⁴ This directive does not provide information which will normally be useful to field personnel in determining whether or not to assist their local law enforcement officials.

Department of Defense Directive 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons, is perhaps one of the most revealing directives issued, since it identifies numerous areas in which the military is authorized to

conduct surveillance on civilians.³⁵ In each of 17 different categories which have been approved by the United States Attorney General, information regarding such items as collection by electronic methods, physical methods, searches, storage, and dissemination of information is outlined.³⁶ While this directive does not directly relate to civilian law enforcement, the information collected under its auspices may be passed to civilian enforcement agencies or expert personnel may be loaned to federal, state, and local law enforcement agencies.³⁷

Army Regulation 500-50, Emergency Employment of Army and Other Resources: Civil Disturbances, provides very little specific guidance to field commanders confronted with requests for assistance from their civilian counterparts. It gives a basic definition of the Posse Comitatus Act, and outlines situations in which the President may order federal troop intervention in civil matters.³⁸ This regulation devotes one section to emergencies and states field commanders may make decisions to intervene if delay will create a "dangerous" situation. Immediately following this authorization however, is a warning that violation of Posse Comitatus is a punishable offense.³⁹ Once again, the regulations leave the field commanders to their own judgement with no real guidance.

Another Army regulation which "authorizes" field commanders to make "emergency" decisions which may violate the Posse Comitatus Act, is Army Regulation 500-60, Emergency Employment of Army and Other Resources: Disaster Relief.⁴⁰ Unfortunately, this "authorization is preceded by the injunction that commanders are responsible to ensure no violations of Posse Comitatus by their personnel assisting in disaster aid."⁴¹

The Air Force provides somewhat more beneficial information to its personnel in Air Force Regulation 125-3, Security Police Handbook.⁴² While not giving specific situations either authorizing or denying permission to intervene, it does list two defenses available to security police charged with violating Posse Comitatus. These defenses, "military necessity" and "superior orders", are discussed with the rationale for their successful use given.⁴³

Air Force Regulation 355-11, Enforcement of Order at Air Force Installations, Control of Civil Disturbances, Support of Disaster Relief Operations, and Special Consideration for Oversea Areas, discusses the authority military forces have over civilians on military installations, and the actions which may be taken to protect military resources. Additionally, it prescribes commander's authority to respond to civil demonstrations

off-base which affect military preparedness.⁴⁴ As with the other regulations discussed, a definition of the Posse Comitatus Act and the civil and criminal liabilities which military personnel face for violating it, are given.⁴⁵

Summary

The review of non-regulatory literature and military regulations strengthens the impression that no one has bothered to provide any clear cut guidance to military leaders regarding how and when they may assist in civilian law enforcement. Furman comes as close as anyone to providing this information. The discriminating reader who has only enough time to review one of these works of literature will probably learn more from Furman's article than any of the others.

Surprisingly, there is little literature devoted to the recent legislative changes brought about by the passage of the Department of Defense Appropriations Act of 1982. It would be reasonable to assume such legislation would be studied and written about extensively. This is not the case, however, this may be because of the relatively short time since its passage and enactment.

The military regulations were especially vague insofar as providing a "solid footing" for military leaders to stand upon. The regulations tended to emphasize such items

as costs and delegation of authority much more than actual "this is authorized, this is not" information. While the military constantly stresses the necessity for officers to use "good judgement," it seems as though the hierarchy intentionally shied away from making any "judgement calls" to assist field commanders in delicate situations involving Posse Comitatus.

This review of Posse Comitatus related literature has revealed very little in the way of specific "thou shall, thou shall not" guidance. The vast majority of the literature has been concentrated upon the historical perspective for Posse Comitatus passage and vague warnings to military personnel who are faced with making decisions on aiding or not aiding civilian law enforcement officials when requested. In an attempt to gain a more thorough perspective of exactly what is authorized, in the next chapter, an examination of court decisions, U.S. Attorney General/military Judge Advocate opinions, and legislative authorizations is conducted.

NOTES

¹ David E. Engdahl, "Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders," Iowa Law Review 57, no. 1 (1971): 28.

² Frederick Bernays Wiener, Civilians Under Military Justice (Chicago: University of Chicago Press, 1967), passum.

³ Wylie E. Oliver, Jr., "The Administration of Military Installations: Some Aspects of the Commander's Regulatory Authority with Regard to the Conduct and Property of Civilians and Military Personnel" (thesis, U.S. Army's Judge Advocate General's School, 1958), passum.

⁴ Major H.W.C. Furman, "Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act," Military Law Review 7 (1960): 85-128.

⁵ Deanne C. Siemer and Andrew S. Effron, "Military Participation in U.S. Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act," St. John's Law Review 74 (1979): 1-54.

⁶ James P. O'Shaughnessy, "The Posse Comitatus Act: Reconstruction Politics Reconsidered," American Criminal Law Review 13 (1976): 703-35.

⁷ Ibid., p. 716-17.

⁸ Ibid., p. 730-35.

⁹ Clarence L. Meeks III, "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act." Military Law Review 70 (1975): 83-136.

¹⁰ Ibid., p. 134-36.

¹¹ Douglas A. Poe, "The Use of Federal Troops to Suppress Domestic Violence," American Bar Association Journal 54 (1968): 168-74.

¹² George H. Faust, "The President's Use of Troops to Enforce Federal Law," Cleveland-Marshall Law Review 7 (1958): 362-69.

¹³ Captain Jan Horbaly and Miles J. Mullin, "Extraterritorial Jurisdiction and Its Effect On the Administration of Military Criminal Justice Overseas," Military Law Review 71 (1976): 1-93.

¹⁴ Ibid., p. 92.

¹⁵ Edward S. Corwin, "Martial Law, Yesterday and Today," Political Science Quarterly 47 (1932): 95.

¹⁶ Ibid., p. 95-104.

¹⁷ "Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy," Duke Law Journal 1 (Winter 1966): 415-62.

¹⁸ Engdahl, op. cit., p. 71-3.

¹⁹ Major Stephen Nypaver III, "Issues Raised in the Prosecution of an Undercover Fence Operation Conducted by

the U.S. Army Criminal Investigation Command," Department of the Army Pamphlet 27-50-112, The Army Lawyer (April 1982): 1-9.

²⁰ Major Robert E. Hilton, "Recent Developments Relating to the Posse Comitatus Act," Department of the Army Pamphlet 27-50-121, The Army Lawyer (January 1983): 1.

²¹ Ibid., p. 8.

²² U.S., Cong., House, Committee on Government Operations, Military Assistance to Civilian Narcotics Law Enforcement: An Interim Report, Report No. 97-921, 97th Cong., 2d sess., 1 Oct. 1982 (Washington, D.C.: GPO, 1983), passum.

²³ Ibid., p. 19.

²⁴ U.S., Cong., House, Committee on the Judiciary, Subcommittee on Crime, Posse Comitatus Act, Hearing, 97th Cong., 1st sess., 3 June 1981 (Washington, D.C.: GPO, 1982), P. 1-58.

²⁵ Ibid., p. 59-783.

²⁶ U.S. Air Force, Air Force Pamphlet 110-3, Civil Law, (6 May 1982): p. 16-1-5.

²⁷ Ibid., p. 16-4-5.

²⁸ U.S. Department of Defense, Department of Defense Directive 5525.5, Department of Defense Cooperation with Civilian Law Enforcement Officials, (5 Apr 1982): passum.

²⁹ Ibid., p. F2-1

30 Ibid., p. E3-1-4.

31 Ibid., p. E4-1.

32 U.S. Department of Defense, Department of Defense Directive 3025.12, Employment of Military Resources in the Event of Civil Disturbances, (19 Aug 1971): p. 1-2.

33 Ibid., p. 4-5.

34 Ibid., p. 6-7.

35 U.S. Department of Defense, Department of Defense Directive 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons, (30 Nov 1979): passum.

36 Ibid.

37 Ibid., p. 101-04.

38 U.S. Army, Army Regulation 500-50, Emergency Employment of Army and Other Resources: Civil Disturbances, (21 Apr 1972): p. 2-1-2.

39 Ibid., p. 2-2.

40 U.S. Army, Army Regulation 500-60, Emergency Employment of Army and Other Resources: Disaster Relief, (20 Aug 1973): p. 1-3.

41 Ibid.

42 U.S. Air Force, Air Force Regulation 125-3, Security Police Handbook, (6 May 1982): 5-1-5.

43 Ibid., p. 5-5.

44 U.S. Air Force, Air Force Regulation 355-11,
Enforcement of Order at Air Force Installations, Control of
Civil Disturbances, Support of Disaster Relief Operations,
and Special Consideration for Oversea Areas, (10 Sep 1971):
passum.

45 Ibid., p. 9.

CHAPTER THREE

Binding Decisions Relating to Posse Comitatus

Introduction

Since the authors of the original Posse Comitatus Act did not give a specific list of authorized and unauthorized military activities, those decisions have been primarily made after the fact through the civil and military courts and U.S. Attorney General/Judge Advocate decisions. One notable exception to this "after the fact" decision process is the Department of Defense Appropriations Act of 1982 which gave specific authorizations to the military in support of civil drug interdiction. These three areas, civil/military court decisions, Attorney General/Judge Advocate decisions, and the Department of Defense Appropriations Act of 1982, are the subject of this chapter.

Civil/Military Court Decisions

This section addresses specific cases and the points of law which were decided and are pertinent to the Posse Comitatus Act. Following the points of law is a brief interpretation of the importance of the case to Posse Comitatus.

Ex parte Milligan:¹

... a citizen, not connected with military or naval service and a resident of a State where courts are open, cannot be convicted otherwise than by ordinary courts of law.

... Congress has enacted laws particular to military and naval forces. Everyone connected with such forces is amenable to the jurisdiction thus provided, and while thus surviving surrenders his right to be tried by civil courts.

... Martial law finds its justification only where, from actual invasion or civil war, the courts are closed, and it is impossible to administer justice according to law. Its duration is limited by its necessity.

... Military commission is without jurisdiction to try and sentence a person not a member of military or naval forces, who at the time of his arrest is a resident of loyal state where courts were open for administration of justice.

... Resident of loyal State, never a resident of State engaged in rebellion nor connected with military or naval forces, cannot be regarded as a prisoner of war.

Although decided prior to passage of Posse Comitatus,

the Milligan decision has bearing on the Posse Comitatus Act because it establishes legal and judicial jurisdiction of the military and civil courts. Military courts have no authority to try civilians as long as the civil courts are functioning. Martial law may only be declared out of necessity, not out of convenience. Military members, however, forfeit their right to civil trial during their military membership. Loyal civilians who have not engaged in either overt or covert military actions cannot be held or tried as prisoners of war.

Ex parte Mason:²

... the order of the Secretary of War, directing guard duty at a jail belonging to the civil department of the government, was ... prohibited by ... the Posse Comitatus Act.

... the alleged crime was not triable ... and that the general court-martial was without jurisdiction and the petitioner's imprisonment is unlawful.

The justices of The Supreme Court rejected the petitioner's request for writ of habeas corpus without comment. This case is, never the less, important since it is the first reported case in which violation of Posse Comitatus was claimed in an attempt to have a decision overturned.

In re Neagle:³

... who can doubt the authority of the President... providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a posse comitatus properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The Neagle court recognized the President's authority to dispatch troops, without violating Posse Comitatus, to protect federal property and prevent impairment of governmental functions.

Although the Neagle decision used the safe passage of the mail as an illustration of authorized presidentially ordered troop intervention, that is the exact reason used by President Cleveland to order federal troop intervention at a later date.⁴ That presidential action led to the next case examined.

In re Debs:⁵

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush

away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the arm of the Nation and all its militia, are at the service of the nation to compel obedience to its laws.

The Debs decision gives the President virtually unlimited discretion to utilize the military to quell domestic violence. This is even applicable in situations where the states government has not specifically requested assistance. This authority does not violate Posse Comitatus.⁶

United States v. Curtiss-Wright Export Corp.:⁷

The broad statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of the internal affairs of the U.S., since the investment of the Federal government with powers of external sovereignty does not depend upon the affirmative grants of the Constitution.

This decision that the Federal government is responsible for conducting foreign affairs may be used to extend authority for federal military to protect foreign

embassies within the United States. This may ordered by the President and is not in violation of the Posse Comitatus Act.⁸

Hirabayashi v. United States:⁹

The war power of the national government is the power to wage war successfully. It extends to every matter and activity so related to war as substantially to affect its conduct and progress, and is not restricted to the winning of victories in the field and in the repulse of enemy forces, but embraces every phase of the national defense, including the protection of war material and members of the armed forces from injury and from the dangers of sabotage and espionage which attend the rise, prosecution, and progress of war.

A curfew order issued by the commander of a West Coast military area during war between the United States and Japan, at a time of possible invasion or air raids, under an executive order authorizing the taking of measures to prevent espionage and sabotage, requiring all persons of Japanese ancestry resident in such area to be in their places of residence daily between the hours of 8 P.M. and 6 A.M. is, within the boundaries

of the war power.

This case was heard and decided during World War II, a period in which national prejudices against people of Japanese ancestry was understandably high. The Supreme Court recognized the unique situations created by declaration of war and upheld the President's authority to appoint military authority over civilian personnel without violating Posse Comitatus.

Chandler v. United States:^{10, 11}

The arrest in Germany by United States troops of a United States national charged with treason committed there during the Second World War, and bringing him back to the United States, did not violate statute prohibiting use of any part of army as a posse comitatus to execute the laws.

When the court determined the Chandler case, it established the precedent which allows U.S. occupation troops to exercise the sovereign powers necessary to maintain law and order in the country of occupation. Since the previous government had been replaced by occupation troops, those troops were authorized to extradite the otherwise unreachable defendant back to the jurisdiction of the court.

Gillers v. United States:¹²

The arrest in Germany by United States troops

of United States national charged with treason committed there during the Second World War, and bringing her back to the United States, did not violate statute prohibiting use of any part of the army as a posse comitatus to execute the laws

The same explanation given in the Chandler case is applicable in Gillers.

D'Aquino v. United States:^{13, 14}

The arrest of American citizen in Japan by military authorities and the bringing of her back to the United States to be tried for treason was not a violation of the Posse Comitatus Act.

The same explanation given in the Chandler case is applicable in D'Aquino.

United States v. Monti:¹⁵

In prosecution for treason, where defendant had entered a plea of guilty, alleged fact that defendant was transferred while in military service from Florida to New York at the instance of the Department of Justice which made a request of the Army to that end as a prerequisite to the arrest of defendant within the New York jurisdiction would not justify granting of defendants motion to set aside the sentence.

Although this case does not specifically address the

Posse Comitatus Act, it is easy to see how closely related the issues of Posse Comitatus and the case are. In its decision, the court authorized transfer of military personnel to return them to a court's legal jurisdiction for apprehension and trial.

Wrynn v. United States:¹⁶

Action against United States for injuries sustained when Air Force helicopter, which was landing after participating in search for escapee, struck tree, causing debris to strike plaintiff. The United States District Court held that the use of Air Force helicopter and its personnel to aid in state's search for nonmilitary prison escapee was forbidden, and personnel were acting beyond their authority that United States could not be held liable for their alleged negligence.

The Armed services are precluded from assisting local law enforcement officials in carrying out their duties - Posse Comitatus.

The importance of this decision lies in the interpretation the court gave to liability for injuries sustained by the plaintiff. Based on the Posse Comitatus Act, the United States is not liable for injuries caused by the negligence of one of its military members acting in

violation of Posse Comitatus. The court clearly stated military personnel and equipment cannot be used to assist local law enforcement. Based on this liability interpretation, it may be assumed the military member who was negligent is personally liable for any injuries sustained.

Cafeteria Workers Union v. McElroy:¹⁷

The control of access to a military base is within the constitutional powers granted to both Congress and the President.

Navy Regulations approved by the President are endowed with the sanction of law.

Navy Regulations providing, generally, that the responsibility of a commanding officer is absolute and that his authority is commensurate with his responsibility and that dealers or tradesmen or their agents shall not be admitted within a command except as authorized by the commanding officer, confer upon the commanding officer of a Navy ordinance installation the power summarily to deny access to a short order cook at a cafeteria on the premises because of a determination by the installation's security officer that she fails to meet security requirements.

This decision establishes military authority to exercise control over civilians within the boundaries of military installations. The commander's authority stems directly from the President and Congress and allows him to take necessary steps to ensure the safety and security of the installation. Expulsion of civilian personnel from military property is not in violation of Posse Comitatus, and barring their return is not a violation of their basic rights.

Maryland v. United States:¹⁸

When a state Air National Guard unit is not in active federal service, one of its members who serves on alternate Saturdays as a commissioned officer and is employed during the rest of the month in the civilian capacity as supervising the maintenance of aircraft assigned to the Guard is, in both his civilian and his military capacity, an employee of the state and not the United States; hence the United States is not liable under the Federal Tort Claims Act for his negligence in either capacity.

This decision establishes National Guard personnel as employees of the state rather than the United States. Based on this interpretation, National Guardsmen are not constrained by the Posse Comitatus Act since they are not

members of the federal military unless called to active federal duty. Once called to federal duty, they are bound by the constraints of Posse Comitatus.

United States v. Elliott:¹⁹

That 1917 statute prohibiting conspiracies to destroy specific property in foreign country at peace with United States had apparently been invoked against no one except defendants charged with conspiring in United States to destroy railroad bridge in Republic of Zambia in order to profit from ensuing copper shortages did not demonstrate deprivation of right of defendants to equal protection, in absence of evidence that other conspirators motivated by desire for financial gain had gone unprosecuted or that evil motive cause discriminatory application of the statute.

The argument that no others had been prosecuted ... raised no constitutional question of equal protection in view of the prevailing system of prosecutorial discretion.

Lack of prosecutions since promulgation ... did not render statute void because of disuse.

Nonuse alone does not abrogate a statute.

The importance of the Elliott decision is not that it

specifically authorizes or disallows actions relative to Posse Comitatus, but rather that it establishes the credibility of the Posse Comitatus Act even today. This is because there have been no criminal prosecutions for violation of Posse Comitatus in its history.²⁰ Using the Elliot decision, one may assume this does not mean Posse Comitatus will never be prosecuted.

United States v. Beeker:²¹

A court martial had jurisdiction to try the accused on charges of wrongfully using and possessing marijuana on a military installation in Texas and while enroute between two points in Texas. The use of marijuana is not, as such defined as a federal offense ... aside from the specifics of federal ... law, the use and possession of marijuana and narcotics by military persons, on or off base, has a special military significance placing such acts outside the limitations on military jurisdiction set out by the Supreme Court...

The Court of Military Appeals identified the use and possession of marijuana and narcotics as an offense which may be investigated by military investigators both on and off base. Off base investigation is authorized because of the special effect drug use has on military preparedness.

Investigation of off base drug offenses is not enforcement of civil law, rather, it is service connected.

Rose v. United States:²²

For purposes of court-martial jurisdiction, offenses of unlawful possession of barbiturates and unlawful delivery of such drugs to another serviceman were both "service connected" offenses whether committed on or off base.

The Court of Military Appeals identifies both possession and delivery of illegal barbiturates as service related offenses therefore military personnel are authorized to investigate these crimes off base without being in violation of Posse Comitatus. This decision and the Beeker decision have been used as the basis for authorizing military police to investigate all off base military drug offenses for military purposes.²³

Burns v. Texas:²⁴

Where defendant, who was convicted of sale of marijuana, and codefendant were soldiers, but college student who volunteered his help in ferreting out crime among the military to Criminal Investigators Division at military base was not a soldier, and city police arrested defendant upon information furnished by such student, assistance given by the Criminal Investigation

Division in apprehending the soldiers was not defense to state penal statute on ground that division agents were used as "posse comitatus or otherwise to execute the laws," as forbidden by federal statute, notwithstanding that college student used marked money furnished by the agents and that agents and student were present when defendant was arrested.

The use of the words "assistance given by the criminal investigation division in apprehending" may be somewhat misleading in this case. The court decided the evidence did not reveal military assistance in the execution of the laws merely by military presence at the time of the arrest. Furthermore, the use of volunteer civilian undercover person by the military investigating a military offense does not automatically make the civilian a part of the military. The information given to civilian authorities in this case was given by the volunteer civilian undercover person with full knowledge and consent of the military investigators, however this is not a violation of Posse Comitatus. There is no reverse application of Posse Comitatus prohibiting civilian assistance to military. This case also cleared the way for military to share with civilians that information which is uncovered during an investigation of military related offenses.

Hubert v. Oklahoma:²⁵

Military CID agents were not incompetent as witnesses in prosecution for sale of marijuana despite a federal prohibition against them acting as posse comitatus, where evidence established that local law enforcement authorities did not summon military agents' assistance and, to contrary, were contacted by agents, who were investigating a soldier from whom they had previously purchased narcotics and proceeded to determine his source of supply, and soldier had led agents to a location outside scope of their military jurisdiction, at which time agents assumed no greater authority than that of a private citizen.

The court in this case has established that military personnel have certain rights as private citizens in addition to the duties of the military. In this case, military investigators who have gained information pertinent to a civil violation while engaged in their lawful military investigation may give testimony in civil court without being in violation of the Posse Comitatus Act. The testimony is not tainted if the investigation was for purely military purposes, and the witness has the same duty to come forward and provide testimony as any citizen.

Laird v. Tatum:²⁶

A Federal District Court class action by civilians complaining of a chilling effect on the exercise of their First Amendment rights caused by the Army's system for alleged surveillance ... which system was instituted by the Army ... in order to secure information relating to potential or actual civil disturbances ... does not present a justiciable controversy for resolution for the courts, where the chilling effect was allegedly caused not by any specific action of the Army against the plaintiffs, but only by the mere existence and operation of the Army's system ...; in such action the plaintiffs do not establish the requisite standing to sue; where they alleged only a subjective "chill," based on their beliefs that the surveillance system was inappropriate to the proper role of the Army, which might at some future date misuse the information in some way that would cause direct harm to the plaintiffs, but where there was no claim of specific present objective harm or a threat of specific future harm.

This Supreme Court decision is the basis for the dispatch of military observers at large civil disorders

which may eventually require federal intervention. This decision establishes that mere observation without present injury or threat of injury is not a violation of rights and is therefore permissible. Military observers are not in violation of Posse Comitatus if they provide no aid or assistance to the civil law agencies.

Jones v. Secretary of Defense:²⁷

Order requiring army reservist to participate in parade to be held as part of national convention of veterans' organization did not force reservists to serve as a "posse comitatus."

This decision recognizes that reservists are in fact a part of the military arm of the federal government and are subject to the proscriptions of the Posse Comitatus Act.

Hildebrandt v. Oklahoma:²⁸

Military criminal investigators, who turned over to city police at city police station the drugs which they purchased from defendant off the military post, were not incompetent as witnesses in prosecution for sale of lysergic acid diethylamine despite federal prohibitions against them acting as posse comitatus.

This case is a confirmation of the rights of military investigators to testify in civil court about information lawfully obtained during military investigations.

For further discussion, see *Hubert v. Oklahoma*, addressed above.

Lee v. Oklahoma:^{29, 30}

Testimony of provost marshal's investigator for CID office at military reservation as to his purchase of narcotic drugs from defendant with money given him by city police officer was not incompetent by virtue of federal prohibition against his acting as a posse comitatus where investigator did not attempt to arrest defendant or to assert any military authority over him.

While it would appear this was indeed a violation of the Posse Comitatus Act by using a military investigator as an undercover agent for civil law enforcement activities, the Supreme court has held the trial judge's opinion is correct. The Posse Comitatus act was intended to prohibit military personnel from coercing or threatening to coerce civilians in ordinary civil law enforcement proceedings. It does not prohibit military assistance to civil law enforcement which does not place the military in positions of authority over civilians.³¹

United States v. Jaramillo:³²

Army's furnishing of material and equipment to FBI agents and United States Marshals in connection with civil disorder did not violate

statute proscribing, except in cases and circumstances expressly authorized by Constitution or act of Congress, willfully using any part of Army or Air Force as posse comitatus or otherwise to execute laws.

In prosecution for obstructing law enforcement officers lawfully engaged in lawful performance of duties incident to civil disorder, based on defendants' alleged attempt to enter occupied village on Indian reservation while United States marshals and FBI agents were containing occupiers during negotiations, Government failed to carry its burden of proving that the actions of marshals and FBI agents were lawful in view of the material contributions of military personnel to the containment operation.

Special operations group of United States marshal service is not an "army" within Constitution of United States or within statute proscribing, except in cases and under circumstances expressly authorized by Constitution or act of Congress, willfully using any part of Army or Air Force as a posse comitatus or otherwise to execute laws.

In the Jaramillo decision, the court decided the loan

of material and equipment to civil authorities does not constitute a violation of the Posse Comitatus Act. It did, however, find the activities of a military observer who gave advice, upon request, to civil authorities in proper actions related to the containment and apprehension of the perpetrators of the Wounded Knee takeover. This violation of Posse Comitatus resulted in one of the charges being dropped. Finally, the court decided that although a special operations unit of the United States Marshal Service, though paramilitary in nature, does not constitute part of the Army, and is not restricted by the Posse Comitatus Act.

United States v. Banks:³³

The Economy Act applies only to sales, and not to loans, and hence did not authorize loan of army equipment to officers of Department of Justice.

Sale and loan of government equipment to Department of Justice to be used in executing laws was not authorized by regulation promulgated under statutes dealing with issuance of presidential proclamation as basis for federal troop intervention in civil law enforcement where no presidential proclamation was involved in case which arose out of Wounded Knee occupation.

Evidence with regard to military involvement in conduct of federal officers during Wounded Knee occupation precluded finding that officers were engaged in the lawful performance of their official duties when they were allegedly interfered with by defendants.

In this decision, a separate trial judge decided the loan of military equipment at Wounded Knee was not authorized under the Economy Act; therefore, without presidential proclamation, that loan was in fact in violation of the Posse Comitatus Act. This decision is in direct contradiction to the decision reached in the Jaramillo case discussed above, however the decision is explained as oversight to the limitations of the Economy Act by the Jaramillo judge. The Economy Act authorizes only the sale of equipment, not the loan of equipment.³⁴ This court agreed with Jaramillo that the advisory activities of the Army observer were in violation of the Posse Comitatus Act, therefore, one charge was dropped as a result of that violation. It should be noted that the violation of the Posse Comitatus Act in this case is not necessarily cause for dropping of criminal charges. The specific charges dropped related to obstruction of law enforcement officers lawfully engaged in their official duties. By being in violation of Posse Comitatus, the

judge ruled the law enforcement officers were not lawfully engaged in those duties.

United States v. Walden:³⁵

Failure to include the Navy and the Marines in the text of the Posse Comitatus Act prohibiting the use of any Army or Air Force personnel to enforce civilian laws does not indicate congressional approval of use of Navy or Marine personnel to enforce civilian laws for Act is applicable to all of armed services.

Use of Marines in undercover investigation of defendants' violations of federal laws prohibiting the sale of firearms to minors and nonresidents violated Navy regulation prohibiting use of Navy and Marine personnel to enforce civilian laws but did not require exclusion of evidence gained through investigation or reversal of defendants' convictions, where there was not a willful intent to violate regulation.

This court decided the Posse Comitatus Act is applicable to the Navy and Marines, even though they are not specifically addressed in it. Their exclusion does not give silent congressional approval for their use in enforcing civil law. A problem arises in that this is a criminal case therefore the letter of the law must hold

precedent. The letter of the law excludes Navy and Marines from Posse Comitatus. The trial judge then addresses the Navy regulations which preclude violation of Posse Comitatus. These regulations do not carry the weight of the Posse Comitatus Act therefore they do not justify dismissal of charges against the defendants. The judge also pointed out that violation of the Posse Comitatus Act carries criminal penalties (the Navy regulation does not) but does not provide for release of criminals because of its violation.³⁶

United States v. Red Feather:³⁷

Intent of Congress in enacting statute prohibiting, except in certain cases, use of Army or Air Force as a posse comitatus or otherwise to enforce the laws was to prevent the direct active use of federal troops, one soldier or many, to execute the laws; Congress did not intend to prevent the use of Army and Air Force equipment in aid of the execution of the laws.

Evidence of direct active use of Army or Air Force troops, one soldier or many, by United States marshals or FBI agents during occupation of Wounded Knee would constitute evidence of unlawful conduct on part of officers and thus be relevant and material to disprove that defendants

interfered with law enforcement officers in lawful performance of their official duties.

Evidence of use of Army or Air Force material, supplies, or equipment of any type or character by United States marshals or agents of FBI to execute laws during occupation of village of wounded Knee would not be evidence of unlawful conduct by officers and thus was irrelevant, immaterial, and inadmissible to disprove that defendants interfered with law enforcement officers in lawful performance of their official duties.

By use of the clause "to execute the laws" in statute which prohibits, except in certain circumstances, use of the Army or Air Force as a posse comitatus or otherwise to execute the laws, Congress intended to make unlawful the direct active participation of federal military troops in law enforcement activities; Congress did not intend to make unlawful the involvement of federal troops in a passive roll in fulfilling law enforcement activities.

Activities which, if undertaken by Army or Air Force, would constitute prohibited active role in law enforcement are arrest, seizure of

evidence, seizure of persons, seizure of buildings, investigation of crimes, interviewing witnesses, pursuit of escaped civilian prisoners, and search of an area for a suspect; evidence that Army or Air Force personnel engaged in such activities during occupation of Wounded Knee would be relevant to disprove allegations that defendants interfered with law enforcement officers who were lawfully engaged in execution of their duties.

Activities which constitute passive role which might indirectly aid law enforcement officers but which would not be prohibited merely because they were undertaken by Army or Air Force personnel include mere presence of military personnel under orders to report on necessity for military intervention, preparation of contingency plans advice or recommendations given to civilian law enforcement officers, and aerial photographic reconnaissance; evidence that military personnel engaged in such activities during occupation of Wounded Knee would not be admissible to disprove allegations that defendants interfered with law enforcement officers in lawful execution of their duties.

In deciding the issue in the Red Feather case, the District Court provided several important decisions relating to the Posse Comitatus Act. Surprisingly, this is not a criminal case, but rather a request for a restraining order preventing Red Feather and others who had been previously charged with offenses relating to the Wounded Knee takeover, from making public statements about certain activities of the Department of Defense and military personnel present at the situation. This court determined only military personnel were subject to the Posse Comitatus Act, not military equipment. The court decided violation of Posse Comitatus by even one military member is enough to constitute unlawful activity. Specific examples of lawful and unlawful military assistance to civilian law enforcement agencies were given, with the determination of active or passive assistance being the decisive factor.

United States v. Banks:³⁸

Posse Comitatus Act ... does not prohibit military personnel from acting upon on-base violations committed by civilians.

When their actions are based on probable cause, military personnel are authorized by statute to arrest and detain civilians for on-base violations of civil law and may also conduct reasonable searches based on a valid

warrant.

Power to maintain order, security and discipline on military reservations is necessary to military operations.

The Posse Comitatus Act is applicable regarding military authority being executed over civilians in locations other than military bases and reservations. Because of the necessity to maintain a ready force, security, order, and discipline are an absolute necessity. The court recognized that necessity in determining the military has authority to arrest and turn over to civil authorities those civilians who are a threat to maintaining those standards. Furthermore, the court recognized the military right to search and seize property upon issue of legal warrant issued by the base commanding officer.

United States v. McArthur:³⁹

It is the nature of their primary mission that military personnel must be trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation, and the posse comitatus statute prohibiting use of any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws, except in certain cases, is intended to meet

that danger.

Posse comitatus statute which prohibits willful use of any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws without the express authority of Congress or the Constitution must be interpreted in the light of the statutory framework which surrounds it, including the economy act which authorizes any department or agency of the Government to "place orders" for materials, supplies, equipment, work or services of any kind that the requisitioned federal agency may be in a position to supply.

Under the posse comitatus statute, which prohibits use of a part of the Army or Air Force to "execute" the law except in certain circumstances, the term "execute" implies an authoritarian act.

The feared use of the Army or Air Force which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive, or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority.

... evidence of use by law enforcement

officers of part of the Army or Air Force, including furnishing of material and supplies and technical advice of an army colonel, was insufficient to preclude convictions ...

In this decision, the court gave an interpretation of the reason for passage of the Posse Comitatus Act. This interpretation recognizes the unique position of the military having to act without time to always consider constitutional freedoms. While this may be one reason for passage of Posse Comitatus, it cannot be the only reason, because immediacy of action is also an everyday occurrence in civil police work. Of prime importance in this case is the reference to considering the framework which surrounds the Posse Comitatus Act. There are numerous statutes and decisions which have given exception to strict interpretation of Posse Comitatus as allowing absolutely no assistance of any kind. This case specifically addresses the Economy Act and gives examples of authorized activity. Of particular interest is the interpretation that "services of any kind" are authorized under the Economy Act. This coupled with the authoritarian definition given to "execute" opens the way for military personnel to repair and maintain equipment and to provide technical advice without being in violation of Posse Comitatus.

United States v. Casper:⁴⁰

Use of armed forces at Wounded Knee, during civil disorder was not material enough to taint presumption that one or more law enforcement officers were acting in performance of their duties.

This decision by the Court of Appeals upheld the earlier discussed opinion in the McArthur case.

It should be noted that the courts hearing Jaramil , Banks (Dennis), Red Feather, and McArthur, were all Federal District Courts and were split on whether or not the military influence at Wounded Knee was a violation of Posse Comitatus. Furthermore, they were split on whether such violation, if it occurred, should result in dismissal of certain charges. The Casper court, hearing essentially the same argument for dismissal as a result of Posse Comitatus violation, determined the military activity was within the boundaries allowed. This decision, therefore, will be used in determining Posse Comitatus authorizations in chapter four.

Kansas v. Danko:⁴¹

Where military policeman participated in search of automobile at request of civilian law enforcement officer with whom he was on "joint patrol," the incidental, technical violation of

the Posse Comitatus Act did not fatally taint the otherwise reasonable search of automobile, and thus exclusionary rule with respect to matters seized was inapplicable.

The Supreme Court of Kansas determined that the search of a civilian automobile by a military member on "joint patrol" with civil police was a violation of the Posse Comitatus Act. The evidence, however, was not removed from testimony since the court could find no evidence that the exclusionary rule should be applied as a result of Posse Comitatus violation. This court held:

... that the Act is for the benefit of the people as a whole, rather than a policy which could be characterized as designed to protect the personal rights of individual citizens as declared in the Fourth Amendment. ...exclusion is unnecessary as an added deterrent to the serious criminal sanctions provided in the Act.⁴²

United States v. Wolffs:⁴³

Even if activities of Army Criminal Investigation Division agents resulting in defendant's arrest on drug charges was violative of Posse Comitatus Act, application of exclusionary rule was not required, and motion to suppress was properly denied.

In this case, as with many others, the court did not decide whether or not a violation of Posse Comitatus was committed. The court determined that even if the Posse Comitatus Act were violated, there was no cause for application of the exclusionary rule. The court commented, however, that if confronted with future widespread violations, an exclusionary rule may be fashioned.⁴⁴

North Carolina v. Nelson:⁴⁵

Violation of statute proscribing use of Army and Air Force as posse comitatus would not call for exclusion of evidence surrendered by military to civilian authorities.

Legislative purpose of Posse Comitatus Act is to preclude direct active use of federal troops in aid of execution of civilian laws, but passive activities of military authorities which incidentally aid civilian law enforcement are not precluded.

Military authorities' surrender of evidence, which had been obtained in military inventory of arrested soldiers' billets, to civilian authorities for use in civilian criminal prosecution of soldiers was only a passive involvement in enforcement of civilian law and did not violate the Posse Comitatus Act.

In this case the court has determined that if a Posse Comitatus violation occurred, it would not call for suppression of evidence gathered in violation. The court further defines those activities proscribed by Posse Comitatus as being direct and active assistance. Any military activities which happen to be of assistance but are not specifically undertaken to provide assistance are defined as passive.

The inventory and securing of personal property of a soldier under arrest is a normal military activity. When evidence which was germane to the civil prosecution was found during that inventory, and subsequently turned over to civil authorities, that assistance was adjudged "passive" and therefore not in violation of Posse Comitatus.

Michigan v. Burden:⁴⁶

Use by state police of member of United States Air Force in investigation of drug trafficking violated the Posse Comitatus Act ... and the airman could not properly testify in criminal trial.

Use of military personnel as undercover agent for civilian authorities is unlawful, whether or not the victim even knows that undercover agent is in the military, and, as long as victim is

subjected to civilian power or authority by use of military personnel, the Posse Comitatus Act is violated.

In this case, the Michigan Court of Appeals held that use of a military member as an undercover agent for civil police is a violation of Posse Comitatus. This was because the undercover agent had full approval of his commanding officer; was to receive special consideration for charges pending against him; and was to receive a transfer to a new base and assignment assisting the Air Force Office of Special Investigations. These reimbursements for the undercover assistance to civil law enforcement made that assistance his military duty. He could no longer be considered as acting in the same capacity as any concerned citizen.

This court also defined active assistance to civilian authorities as a violation even though the victims may not be aware that military personnel are exercising authority over them.

Finally, the Burden Court held that since there have been no criminal prosecutions in the history of the Posse Comitatus Act, the only real sanctions which could be used to dissuade people from violating it is the use of an exclusionary rule against all evidence collected in violation.⁴⁷

North Carolina v. Trueblood:⁴⁸

Violation of Posse Comitatus Act did not call for invocation of exclusionary rule, ...

Where defendant, an officer in United States Army, was subject to military discipline and control, his illicit drug dealings were of direct concern to agents of Army Criminal Investigation Division in performing their duties ... there was no ... violation of Posse Comitatus Act.

Once again, the court has ruled against exclusion of evidence if there is a violation of Posse Comitatus. Additionally, this court has ruled that when personnel subject to military discipline are involved in drugs, it becomes a matter of direct military concern and the military is authorized to investigate or provide passive assistance to civilian authorities who may also be investigating.

People v. Blend:⁴⁹

... posse comitatus ... applies to all branches of the federal military.

Defendant ... was not entitled to relief on theory that the assistance given ... violated Posse Comitatus Act, in light of fact that no evidence subject to defendant's motion was obtained through or during the arresting process.

Prohibition of the Posse Comitatus Act does not apply to military personnel who are acting clearly on their own initiative as private citizens.

Mere fact that Naval Investigative Service, on occasions in which it was informed of sheriff's narcotics task force's investigation of defendant, provided member of such force with a pass to enter Naval air station did not violate Posse Comitatus Act.

This California court interprets the Posse Comitatus Act as applicable to all branches of the federal military, not just the Army and Air Force.

While the court does not eliminate the exclusionary rule, it does imply that if such rule were applicable, only that evidence collected in violation need be excluded. Furthermore, the activities of military personnel acting on their own initiative and without military orders is not a violation of Posse Comitatus because they have assumed the duties of a private citizen.

There is no violation in providing base entry passes to civil law enforcement agents in the performance of their duties. This is passive assistance.

United States v. Chaparro-Almeida: 50

The Posse Comitatus Act, prohibiting use of

the military services in civil law enforcement,
is not applicable to the Coast Guard.

Very little explanation is necessary for this
judgement. The Coast Guard does not fall under the
provisions of the Posse Comitatus Act because part of their
mission is to enforce the federal laws upon the territorial
seas of the United States.

United States v. Hartley:⁵¹

Participation of military inspectors in
investigation of alleged conspiracy to defraud
the government ... did not violate Posse
Comitatus Act where inspectors had merely exer-
cised their responsibilities pursuant to contract
between government and defendant ... and military
aided civilian ... only to the extent of activi-
ties performed in ordinary course of their
duties.

This is another example of the authorization for
military personnel to provide assistance to civilians if
such assistance is not specifically rendered for other than
normal military purposes.

North Carolina v. Sanders:⁵²

Purpose of Posse Comitatus Act is to preclude
direct active use of federal troops in aid of
execution of civilian laws, and where city police

department did not use military policemen to execute civilian law but, rather, patrolled street for purpose of removing military personnel from situations potentially involving breach of civil law, there was no violation of Act.

Violation of Posse Comitatus Act does not call for invocation of exclusionary rule.

Once again, a court gives the "direct active participation" interpretation to military assistance which is in violation. This is a case requiring a decision about a "town patrol" in which the determining factor was the duties of that patrol. The court rules that a "town patrol" whose duties are to remove military personnel from potential situations breaching civil law, is a military matter and does not constitute direct active execution of civil law.

Taylor v. Oklahoma:⁵³

Violations of Posse Comitatus Act ... does not necessitate automatic invocation of exclusionary rule.

Evidence obtained pursuant to arrest of defendant ... would be suppressed on ground that arrest violated Posse Comitatus Act ... where intervention by military police officer who actively participated in undercover drug pur-

chase, pulled gun during arrest, and participated in search of defendant's house after arrest was excessive.

Lest civilian and military authorities become complacent as a result of decisions that violations do not necessitate exclusion of evidence, this court decides to exclude. It should be noted that the court does not automatically exclude, but makes its decision based on flagrant and excessive violation. In comments, the judge states that in light of the lack of criminal prosecutions for Posse Comitatus violation, another step is necessary to preclude further excessive violations. That step was exclusion of evidence gathered unlawfully in violation of Posse Comitatus.⁵⁴

Harker v. Alaska:⁵⁵

In view of facts that military had a legitimate independent interest in protecting persons on Army base from fleeing armed felons and that the police did not request assistance from the military, conduct of military police in searching and seizing evidence from defendant and vehicle in which he was a passenger did not violate the Posse Comitatus Act.

The inherent authority to take action to protect residents of military reservations by removing dangerous

personnel was recognized in this decision. The court ruled the stopping and subsequent arrest of Harker was a military function. Further, the base commander has the authority to turn military personnel over to civil authorities for prosecution.

I find the decision regarding the admissibility of evidence seized during search of the defendant's automobile curious, however. Harker contends the evidence was seized in violation of Posse Comitatus, therefore should be excluded. As we've seen so many times before, exclusion was denied, however, this time on the basis that the civil authorities had not requested the search, therefore they had not "willfully" used the military to execute the laws.⁵⁶ It is interesting that Harker did not establish an illegal search and seizure defense based upon no valid search warrant being issued, since search incident to apprehension is not normally extended to vehicles.

United States v. Yeary:⁵⁷

This decision, as yet unpublished, found no violation of Posse Comitatus in a case where a military undercover investigator was included in a civil conspiracy to rob a bank. The investigator had originally been involved in an investigation of military drug trafficking. When the second conspiracy, which was not military in nature, was learned, the investigator reported it to Criminal

Investigative Division and Federal Bureau of Investigation. He remained in his undercover capacity and gathered information about both the drug crimes and the conspiracy to rob a bank.

The Fourth Circuit Court of Appeals ruled there was no violation of Posse Comitatus since the investigation which led to arrest for conspiracy was initiated as a matter of military interest and the subsequent information resulted from legal military activities. The court contends that it is not reasonable for military to drop an ongoing investigation when it extends into new crime areas. The military was correct in immediately letting civil authorities know they had uncovered civil crimes.

This concludes the examination of civil and military court decisions which have a binding effect on the use of military personnel assisting civil law enforcement. The next section will identify and explain United States Attorney General and military Judge Advocate General opinions.

United States Attorney General/Military Judge Advocate

Opinions

Throughout the nation's history, there have been many requests to use military personnel in support of civil law enforcement. Since the passage of the Posse Comitatus Act,

several of these requests have been forwarded to either the United States Attorney General or military Judge Advocate General of the various services for guidance before authorization. Recognizing the time consumed for an opinion to be given, the following compendium is included to provide guidance in the future. While these opinions do not carry the weight of court decisions, they have been given after thorough examination of case history and provide a measure of safety for military personnel faced with requests for assistance.

Military forces cannot be used to assist civil law enforcement in the suppression of "organized, armed, and fortified resistance" unless so ordered by the President under his powers when resistance has become beyond the powers of the civil judicial process. Before ordering federal troops to intervene, the President must issue a dispersal proclamation.⁵⁸

Federal troops may not be ordered to assist civil law enforcement officials in arresting persons charged with robbing governmental officials.⁵⁹

The Posse Comitatus Act does not abrogate the powers granted to the President by the Constitution or by Congress. There are specific instances when the President is authorized to use federal troops to enforce the laws as he deems necessary.⁶⁰

This decision centers around the President's authority to call out troops in support of Prohibition enforcement. The Attorney General determined there was no authority to use the Navy for this purpose since the courts and civil law enforcement agencies were still functioning. He further decided violation of Prohibition did not constitute "unlawful obstructions, combinations, or assemblages ... or rebellion," therefore the President had no authority to use the military under his powers to suppress such actions.⁶¹

In 1957, the Attorney General issued an opinion directly relating to the President's use of federal troops during the integration of Central High School in Little Rock, Arkansas. The Attorney General points out that the President has the power to federalize a state National Guard and to use them to "suppress domestic violence, obstruction and resistance to Federal Law and Federal court orders."⁶²

Although the following Attorney General opinions were not officially published, they should be considered in the same light as those listed above.

A request to authorize military maneuvers in a specific area to suppress drug smuggling is deemed as violative of the Posse Comitatus Act.⁶³

Military investigators may not be used to provide

active assistance to Department of Justice investigators in the pursuit of fraud cases. They may, however, provide expert advice or other indirect assistance as needed. They may also provide information related to the case which was collected during the normal course of military duties.⁶⁴

The President may use troops to prevent interference with federal employees and subsequent impairment of governmental functions during planned anti-government demonstrations. The troops may be used to prevent traffic obstructions, and if necessary assume control if normal police functions collapse or if federal court orders are defied.⁶⁵

The President may order troops to guard foreign embassies in situations where routine police activities are not sufficient. This includes the use of military helicopters to insert anti-terrorist forces.⁶⁶

Under the Department of Transportation Act, military personnel may be assigned temporarily to the Department of Transportation. While so assigned, they retain all military rank and privileges, however, are no longer subject to the command of their military branch or other military officers. Instead, they are subject to the commands of the Secretary of Transportation therefore are not considered part of the military arm of the government. Military personnel so assigned may be legally deputized and

have the same powers as United States Marshals without there being a violation of Posse Comitatus.⁶⁷ This decision relates directly to the "sky marshal" program to combat skyjacking.

If the Secret Service feels a situation is beyond their capability, they are authorized to request and use troops to protect the President.⁶⁸

Military personnel may not be used to search areas near, but not on, military property in an attempt to locate criminal suspects for civil arrest without violating Posse Comitatus.⁶⁹

Military personnel may be dispatched to provide protection of civilians transporting large sums of military funds at locations which are not within the confines of the base boundaries.⁷⁰

Military police have jurisdiction over all personnel who are within the boundaries of a military installation, however, they do not have jurisdiction over non-military personnel who are not within the boundaries of an installation. They retain jurisdiction over military personnel off-installation with regards to violations of military law.⁷¹

Military assistance in the suppression of domestic violence may not be rendered except as authorized by presidential direction during time of emergency. This

authority may not be delegated from the President to a commanding officer.⁷²

Military personnel may interrogate and use civilians when investigating suspected narcotics violations of military personnel.⁷³

Military police may not accompany civil police to render active assistance enforcing the law, but may accompany them when the purpose is to police military personnel involved in potential situations of disorder.⁷⁴

Use of a military lie detector and operator to determine whether to administratively separate a government employee is not a violation of the Posse Comitatus Act if no criminal charges are to be filed, and both the employee and the employer agree to use of such machinery and operator. Lie detector may also be used when legitimately investigating military offenses for military purposes, however, may not be used to provide information in a civil case if no military investigation is applicable.⁷⁵

Military personnel may not be used to guard civilian prisoners housed in a state penitentiary, even if those prisoners have "volunteered" to participate in federal research programs.⁷⁶

Military may not provide crowd control at civilian activities such as parades.⁷⁷ Similarly, they may not be used as traffic control at intersections adjacent to

military installations during peak traffic periods. They may direct both civilian and military traffic on military installations.⁷⁸

Military investigators, who are investigating military offenses, may request civil authorities issue warrant and search off base premises of a person subject to military authority. Civilians may actively assist military, but military may not actively assist civilians.⁷⁹

Blood tests for determining intoxication may be taken from civilians who are suspected of being intoxicated on a military installation if they consent and the tests are to be used for military purposes such as suspension of on-base driving privileges. They may not be taken without permission.⁸⁰ Blood tests may not be taken solely for the purpose of providing them to civilian authorities.⁸¹

Military police may not be dispatched off the installation to escort private bank funds either to or from private banks which are located on the installation.⁸²

Military personnel should not be appointed as state game wardens for the purpose of enforcing game laws within the base boundaries.⁸³

Military personnel may be used as customs inspectors of military controlled or leased transportation to prevent the importation of contraband into the United States on such transportation.⁸⁴

Rape victims may not be examined in military medical facilities for the sole purpose of providing results to civil law enforcement officials as evidence. They may be examined for medical care and treatment and results obtained in such examination may be released to civil law enforcement.⁸⁵

Military personnel may hold part-time off-duty employment as private security guards.⁸⁶

The Civil Air Patrol is not a part of the military and the proscriptions of Posse Comitatus do not apply to it.⁸⁷

Military police may detain suspected intoxicated civilian drivers on base and turn them over to civil authorities for prosecution.⁸⁸

Military explosive detection dogs may be dispatched in emergency situations to civilian locations when their capabilities are needed but cannot be provided by civil authorities.⁸⁹

Military patrols may be dispatched off-base for the purpose of monitoring the driving conduct of military personnel operating military vehicles. This must be limited to military vehicles in order to avoid violation of Posse Comitatus.⁹⁰

Military police may use deadly force to repel armed attacks on convoys of priority resources off base. They

may not pursue or apprehend repelled attackers outside the immediate vicinity of the resource. If attackers are captured, they may be held and turned over to civil authorities.⁹¹

This concludes the examination of military Judge Advocate opinions. The reader should be aware that many other opinions have been expressed, however, this compendium did not address duplicate opinions rendered by separate services.

Department of Defense Authorization Act of 1982

When the President signed the Department of Defense Authorization Act of 1982, a new chapter was added to Title 10 of the United States Code. This chapter delineated certain assistance the military may provide civilian law enforcement agencies without violating the Posse Comitatus Act. This legislation provided the following guidelines as summarized by Chief of the General Law Division of the Judge Advocate General of the Air Force:⁹²

... permits sharing of information with civilian law enforcement officials having jurisdiction to enforce laws connected with the information...

... permits Sec Def to make available to civilian law enforcement personnel, for law enforcement purposes only, Army, Navy, Air Force, and

Marine Corps facilities and equipment...

... authorizes use of military personnel to train civilians in operation and maintenance of military equipment made available to civilian law enforcement authorities.

... authorizes military personnel ... to operate or maintain ... equipment made available to civilian law enforcement authorities, upon the request of a cabinet level official having jurisdiction to enforce drug, customs, or immigration laws when the cost or time for training civilian personnel ... would make such training impractical; but such assistance generally may be given only to the extent of monitoring and communicating the movements of air and sea traffic ... military personnel may operate and maintain such equipment outside the land area of the U.S. while the equipment is being used to transport civilian law enforcement personnel or being used as a base of operations for such personnel.

... prohibits direct participation by military personnel in the interdiction of a vessel or aircraft or in arrests, searches or seizures, or similar operations ...

... provides that none of the assistance authorized may adversely affect military preparedness.

Summary

This chapter has reviewed and examined civil and military court decisions, U.S. Attorney General/military Judge Advocate General opinions, and the Department of Defense Authorization Act of 1982. Each of these areas contains decisions which are binding upon the military and enforcement of civil law.

In studying civil and military court cases, the absence of prosecutions for Posse Comitatus violations is conspicuous. Simply stated, there have been none. The Posse Comitatus Act has been primarily used in an attempt to have evidence excluded. Consistently, the courts have ruled violation of Posse Comitatus does not carry the same exclusionary rules as violation of the Fourth Amendment. Because of this, several possible violations of Posse Comitatus were never decided. The courts generally stated since there was no exclusionary rule applicable, there was no reason to determine whether or not the violation occurred. There were two notable exceptions in which courts decided to exclude evidence based on the flagrancy of the violation and in an attempt to show that such flagrant

violations will not be allowed.^{93, 94} While the Posse Comitatus Act is a prohibition on the military, the surprising majority of cases in which Posse Comitatus defenses have been attempted have been decided in support of the military assistance which was rendered.

In reviewing the Attorney General/Judge Advocate decisions, the decisions are fairly evenly split among prohibitions and authorizations. The majority of the Attorney General decisions related to the authorizations allowed under the President's authority granted by the Constitution. The Judge Advocate decisions were generally answers to specific inquiries from supervisors on operational use of military personnel. Generally, the decisions of the Attorneys General and the Judge Advocates General were more restrictive than the courts. Perhaps this is because both the Attorney General and the Judge Advocate realized there would be specific actions taken as a result of their advice and were more conservative in an attempt to preclude accusations of Posse Comitatus violation.

The final section of this chapter addressed the Department of Defense Appropriations Act of 1982, which gave specific authorizations to military assistance in drug interdiction, customs, and immigration control. Although apparently loosening the restraints of Posse Comitatus, the

authorizations of this legislation really do not appear to have granted any authorizations which had not already been decided before judicial forum.

This concludes the examination of decisions which have had a binding effect upon military assistance to civil law enforcement and the Posse Comitatus Act. In the following chapter, comprehensive lists of authorizations and prohibitions of these decisions is provided.

NOTES

- ¹ Ex parte Milligan, 71 US (4 Wall) 2, 141-2, (1866).
- ² Ex parte Mason, 256 F. 384, (N.D.N.Y. 1882).
- ³ In re Neagle, 135 US 1, (1890).
- ⁴ William H. Rehnquist to R. Kenly Webster, U.S. Attorney General Opinion, 29 Apr 1971, U.S., Cong., House, Committee on the Judiciary, Subcommittee on Crime, Posse Comitatus Act, Hearing, 97th Cong., 1st sess., 3 Jun. 1981 (Washington, D.C.: GPO, 1982), P. 555-7.
- ⁵ In re Debs, 158 U.S. 564, 582. (1895).
- ⁶ Edward S. Corwin, "Martial Law, Yesterday and Today," Political Science Quarterly 47 (1932): 102.
- ⁷ U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, (1936).
- ⁸ William H. Rehnquist to Robert E. Jordan III, U.S. Attorney General Opinion, 11 May 1970, U.S., Cong., House, Committee on the Judiciary, Subcommittee on Crime, Posse Comitatus Act, Hearing, 97th Cong., 1st sess., 3 Jun. 1981 (Washington, D.C.: GPO), 1982, p. 558-61.
- ⁹ Hirabayashi v. U.S., 320 U.S. 304, (1943)
- ¹⁰ Chandler v. U.S. 171 F. 2d, 921, (1st Cir. 1952).
- ¹¹ Chandler v. U.S. Cert. Den., 336 U.S. 918, (1949).
- ¹² Gillers v. U.S., 171 F. 2d, 962, (D.C. Cir. 1950).
- ¹³ D'Aquino v. U.S. 192 F. 2d, 338, (9th Cir. 1952).

- ¹⁴ D'Aquino v. U.S. Cert. Den., 343 U.S. 935, (1952).
- ¹⁵ U.S. v. Monti, 168 F. Supp. 671, (E.D.N.Y. 1958).
- ¹⁶ Wrynn v. U.S., 200 F. Supp. 457, (E.D.N.Y. 1961).
- ¹⁷ Cafeteria Workers Union v. McElroy, 367 U.S. 886, (1961).
- ¹⁸ Maryland v. U.S., 381 U.S. 41, (1965).
- ¹⁹ U.S. v. Elliott, 266 F. Supp. 318, 326, (S.D.N.Y. 1967).
- ²⁰ James P. O'Shaughnessy, "The Posse Comitatus Act: Reconstruction Politics Reconsidered." American Criminal Law Review 13 (1976): 703.
- ²¹ U.S. v. Beeker, 18 U.S.C.M.A. 563, 1969).
- ²² U.S. v. Rose, 19 U.S.C.M.A. 3, (1969).
- ²³ Clarence L. Meeks III, "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act." Military Law Review 70 (1975): 112.
- ²⁴ Burns v. Tx., 473 S.W. 2d 19, (Tx. Crim. App. 1971).
- ²⁵ Hubert v. Ok., 504 P. 2d 1245, (Ok. Crim. App. 1972).
- ²⁶ Laird v. Tatum, 408 U.S. 1, 15-16, (1972).
- ²⁷ Jones v. Secretary of Defense, 346 F. Supp. 97, (D. Mn. 1972).

- 28 Hildebrand v. Ok., 507 P. 2d 1323, (Ok. Crim. App. 1973).
- 29 Lee v. Ok., 513 P. 2d 125, (Ok. Crim. App. 1973).
- 30 Lee v. Ok. Cert. Den., 415 U.S. 932, (1973).
- 31 Mary C. Lawton to Deanne Siemer, U.S. Attorney General Opinion, 24 Mar 1978, U.S., Cong., House, Committee on the Judiciary, Subcommittee on Crime, Posse Comitatus Act, Hearing, 97th Cong., 1st sess., 3 June 1981 (Washington, D.C.: GPO, 1982), p. 538.
- 32 U.S. v. Jaramillo, 380 F. Supp. 1375, (D. Neb. 1974).
- 33 U.S. v. Banks, 383 F. Supp. 368-75, (D.S.D. 1974).
- 34 Ibid., p. 376.
- 35 U.S. v. Walden, 490 F. 2d 372-6, (4th Cir. 1974).
- 36 Ibid., p. 379.
- 37 U.S. v. Red Feather, 392 F. Supp. 916, (D.S.D. 1975).
- 38 U.S. v. Banks, 539 F. 2d 14, (9th Cir. 1976).
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- 40 U.S. v. Casper, 541 F. 2d 1275, (8th Cir. 1976).
- 41 Ken. v. Danko, 548 P. 2d 819, 824-25, (Kan. 1976).
- 42 Ibid.

- 43 U.S. v. Wolffs, 594 F. 2d 77, 85, (5th Cir. 1979).
- 44 Ibid.
- 45 N.C. v. Nelson, 260 S.E. 2d 629, (N.C. Sup. Ct. 1979).
- 46 Mich. v. Burden, 288 N.W. 2d 392, Mich. Crim. App. 1980).
- 47 Ibid., p. 395.
- 48 N.C. v. Trueblood, 256 S.E. 2d 662, (N.C. Crim. App. 1980).
- 49 People v. Blend, 175 Cal. Rptr. 263, (5th Dist. 1981).
- 50 U.S. v. Chaparro-Almeida, 679 F. 2d 423, (5th Dist. 1982).
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- 52 N.C. v. Sanders, 281 S.E. 2d 7, (N.C. Sup. Ct. 1981).
- 53 Taylor v. Ok., 645 P. 2d 522, (Ok. Crim. App. 1982).
- 54 Ibid., p. 523.
- 55 Harker v. Ak., 663 P. 2d 932, (Ak. Sup. Ct. 1983).
- 56 Ibid., p. 937.
- 57 "No Posse Comitatus Act Violation in Bank Robbery Investigation," Military Law Reporter 11 (1983): 1075.

58 16 Op. Atty. Gen. 162 (1878).

59 17 Op. Atty. Gen. 71 (1881).

60 19 Op. Atty. Gen. 570 (1890).

61 33 Op. Atty. Gen. 562 (1932).

62 41 Op. Atty. Gen. 313 (1957).

63 Mary C. Lawton to Deanne Siemer, U.S. Attorney
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on the Judiciary, Subcommittee on Crime, Posse Comitatus
Act, Hearing, 97th Cong., 1st sess., 3 June 1981
(Washington, D.C.: GPO, 1982), p. 532.

64 Ibid., p. 528.

65 Rehnquist, op. cit., p. 555.

66 Rehnquist, op. cit., p. 558.

67 William H. Rehnquist to Benjamin Forman, U.S.
Attorney General Opinion, 30 Sep 1970, U.S. Cong., House,
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(Washington, D.C.: GPO, 1982), p. 562.

68 William H. Rehnquist to Robert E. Jordan III,
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House, Committee on the Judiciary, Subcommittee on Crime,
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1981 (Washington, D.C.: GPO, 1982), p. 565.

69 JAG 370.6, 17 May 1930.

70 JAG 370.6, 28 June 1924.

- 71 JAG 537.9, 24 Sep 1919.
- 72 JAG 000.51, 10 Jul 1929.
- 73 JAGA 1952/4810, 26 May 1952.
- 74 JAG 252.5, 14 Jun 1922.
- 75 JAGA 1953/6465, 25 Aug 1953.
- 76 JAGA 1953/8755, 12 Nov 1953.
- 77 JAGA 1954/6426, 16 Jul 1954.
- 78 JAGA 1956/8555, 26 Nov 1956.
- 79 JAGAF 1957/11, 7 Feb 1957.
- 80 JAGA 1959/1745, 16 Feb 1959.
- 81 JAGAF 1964/511, 29 Jul 1964.
- 82 JAGAF 1965/861, 10 Dec 1965.
- 83 JAGAF 1966/125, 9 Mar 1966.
- 84 JAGAF 1973/113, 3 Aug 1973.
- 85 JAGAF 1975/99, 5 Nov 1975.
- 86 JAGAF 1976/21, 11 Mar 1976.
- 87 JAGAF 1976/26, 24 Mar 1976.
- 88 JAGAF 1976/72, 5 Oct 1976.
- 89 JAGAF 1979/31, 23 Apr 1979.
- 90 JAGAF 1983/61, 12 Aug 1983.
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92 Military Cooperation with Civilian Law

Enforcement Officials, Letter from the Office of the Judge Advocate General to All Staff Judge Advocates and Chief Circuit Judges, 3 Dec 1981, Office of the Judge Advocate,

Mather Air Force Base, California.

⁹³ Taylor v. Ok., loc. cit.

⁹⁴ Michigan v. Burden, loc. Cit.

CHAPTER FOUR

Summary and Conclusions

Summary

The information given in the preceding chapters was researched and presented to serve a single function. That function is to provide a single source document which may be used by military personnel to provide some guidance in responding to requests for assistance from civilian authorities. The "safe" response to such requests is a rapid denial to all such appeals. By responding in this manner, military personnel will never run the risk of violating the Posse Comitatus Act, therefore they will never place themselves in jeopardy of the penalties for such violation. Unfortunately, by taking the "safe" course of action, military personnel may also be weakening the law enforcement systems of our nation by failing to provide assistance which is entirely lawful.

The aforementioned chapters provided information which may now be used to compile lists of activities which have been either determined as non-violative of the Posse Comitatus Act or violative of the Posse Comitatus Act. The use of these lists and their related citations will not necessarily prevent accusations of violation of Posse Comitatus by suspects or defendants in civil court, but it

will provide a beginning for justifying the actions taken. It may also be of some benefit to military attorneys who are faced with the monumental task of researching the legal history of our nation to provide Posse Comitatus guidance to field commanders.

Non-violative Military Assistance

Based upon an extensive review of civil and military case history, United States Attorney General and Judge Advocate General opinions, and the recently enacted Department of Defense Appropriations Act of 1982, the following examples have been found to be non-violative of the Posse Comitatus Act. Legal precedent has been established to allow military commanders to assist or engage in civil law enforcement in the following situations and examples:

1. Upon presidential order to protect Federal property.¹
2. Under presidential order invoking war powers to protect the war making capability of the nation.²
3. When occupying enemy territory, military has authority to apprehend and transport U.S. civilians who have committed crimes against the U.S. back to the jurisdiction of the court.^{3, 4, 5}
4. Military personnel may be transferred from one

location to another for the purpose of returning them to a court's jurisdiction for apprehension and trial.⁶

5. Military commanders may expel and bar civilian personnel from military property to ensure the security and safety of that property.⁷

6. State National Guard may actively assist in civil law enforcement any time they are not serving on Federal active duty.⁸

7. Illegal drug use, possession, and delivery to other military members, by a military member has a bearing on military preparedness and may be investigated by military both on and off the military installation.^{9, 10}

8. Civilians may be used to assist the military in military investigations.¹¹

9. Information uncovered during a military investigation may be shared with civil authorities.^{12, 13}

10. Military personnel may be present at civilian investigations and arrests, however, may take no active part. They may observe only.¹⁴

11. Military investigators may testify as prosecution witnesses in civil court to reveal information gathered during lawful military investigations. In so doing, they are acting as private citizens rather than military investigators.^{15, 16}

12. Military observers may be ordered to sites of

civil disturbances which might require federal troop intervention. Their mere presence is not a violation of Posse Comitatus.¹⁷

13. Military personnel may provide assistance to civil authorities as long as they are never placed in any position of authority over civilians.¹⁸

14. Military equipment and material may be loaned to other federal law enforcement agencies.^{19, 20, 21, 22, 23}

15. Military equipment and material may be sold to other Federal agencies.²⁴

16. Military may provide "passive" assistance such as advice, recommendations, or aerial photo reconnaissance, to civilian authorities.²⁵

17. When ordered to observe domestic disturbances, military personnel may report the necessity for intervention to their superiors and may develop contingency plans for such intervention.²⁶

18. The military has the authority to arrest and detain civilians on the installation and turn them over to civil authorities for prosecution.^{27, 28}

19. Military police may search and seize civilian property on the installation with a legally issued search warrant from the installation commander.²⁹

20. When observing civilian police activities, military personnel should avoid wearing the uniform, carry

no weapon, take no photos, conduct no interviews, take no statements, nor coordinate any civilian police activities with military authorities.³⁰

21. Military may provide identification of military personnel to civil authorities.³¹

22. When acting as private citizens, military personnel may provide any assistance necessary to civil authorities.³²

23. The military is authorized to provide base entry passes to civilian authorities who are conducting a civil investigation.³³

24. The Coast Guard does not fall under the constraints of the Posse Comitatus Act and may actively assist civil law enforcement agencies as necessary.³⁴

25. Whenever a contract between civilians and the military calls for military inspection of goods or services, that inspection process may also be conducted by the military in an investigation to determine whether the civilian is guilty of defrauding the government.³⁵

26. Military personnel may be used to assist civil authorities in returning arrested military members to the installation.³⁶

27. Military police may stop suspected civil felons who have fled onto the installation.³⁷

28. Military police may search, seize, and turn over

36. The military may provide assistance as requested by the Secret Service in the protection of the President.⁵⁰

37. Military police may provide off-installation protection to military funds in transit.⁵¹

38. The military is authorized to exercise jurisdiction over civilians who are within the boundaries of the installation.⁵²

39. Military investigators may interrogate civilians when investigating military personnel suspected of drug violations.⁵³

40. Military police may patrol jointly with civil authorities, but may only be used to remove military personnel from situations which may escalate into violations of civil law.^{54, 55}

41. With the permission of the subject, military personnel may administer lie detector tests to civilians for strictly administrative purposes.⁵⁶

42. With the permission of the subject, military personnel may administer lie detector tests to military members when investigating violations of military law.⁵⁷

43. Military personnel may provide traffic control of civilian vehicles operating on the installation.⁵⁸

44. With the permission of the subject, military personnel may conduct blood tests to determine the

intoxication level of civilians suspected of driving while intoxicated on the installation . The results may only be used for administrative purposes such as suspension of installation driving privileges.⁵⁹

45. Military personnel may provide customs inspection of military and military contracted civil aircraft departing overseas locations enroute to the U.S.⁶⁰

46. If rape victims are provided care and treatment by the military, the results of any examination conducted during the care and treatment may be released to civil authorities.⁶¹

47. Military personnel may be employed part-time in an off-duty status as private security guards without violating Posse Comitatus.

48. The Civil Air Patrol is not a part of the military and may provide active assistance to civil authorities.⁶²

49. Civilians suspected of driving while intoxicated on an installation may be detained by the military and turned over to civil authorities for testing and prosecution.⁶⁴

50. Military explosive detection dogs and handlers may be dispatched by the installation commander to assist in civil emergencies if the civil authority does not possess explosive detection dogs.⁶⁵

51. Military patrols may be dispatched off the installation to monitor the operation of military motor vehicles.⁶⁶

52. Military personnel may use deadly force against civilians to protect priority resources off the installation.⁶⁷

53. Military personnel may capture and hold civilians who attack military priority resources. These captives may be turned over to civil authorities for prosecution.⁶⁸

54. Military facilities and equipment may be provided to civilian authorities for drug interdiction, customs, or immigration control.⁶⁹

55. Military personnel may operate and maintain equipment loaned to civil authorities when it is not feasible for civilian operators or maintenance personnel to be trained.⁷⁰

56. Military personnel may train civilians in operation and maintenance of military equipment loaned to civil authorities.⁷¹

57. When civil authorities are being transported in a military airplane or ship to enforce civil law in compliance with the Department of Defense Appropriations Act of 1982, military personnel may operate monitoring and communications equipment.⁷²

Violative Military Assistance

Just as the previously discussed research identified certain non-violative military assistance which may be rendered to civilian law enforcement, it also revealed certain actions which have been deemed violative of Posse Comitatus. Military personnel using these lists as guidance in making decisions should bear in mind that like the above list, the examples and situations described below were extracted from decisions which have established precedent against specific military actions because of Posse Comitatus. Here then, are the prohibitions placed upon military assistance:

1. Military court martial may not try civilians except under declaration of martial law.⁷³
2. The military may not assist local law enforcement to search for nonmilitary criminal escapees, or in other performance of their duties. If assistance is rendered unlawfully, the government is not liable for any negligence of the military member so assisting.^{74, 75}
3. National Guardsmen called to Federal Active Duty are bound by the constraints of Posse Comitatus.⁷⁶
4. Reservists on active or inactive duty are bound by the restraints of Posse Comitatus.⁷⁷
5. The Navy and Marine Corps may not intentionally violate the Posse Comitatus Act merely because their

branches of the military are not specifically identified in its text.⁷⁸

6. Military personnel may not provide "active assistance" to civil authorities such as arresting, seizing evidence, seizing persons, seizing buildings, investigating crimes, interviewing witnesses, pursuing escaped civil prisoners, or searching areas for suspects.^{79, 80}

7. A military member assisting civil authorities as a "private citizen" may not receive compensation from the military for the assistance rendered. Compensation by either money or special considerations makes the assistance duty related and a violation of Posse Comitatus.⁸¹

8. Military personnel may not perform duty as an undercover agent for civil authorities.⁸²

9. Military personnel who draw or brandish weapons while serving as observers at civil arrests are exerting authority and are in violation of Posse Comitatus.⁸³

10. The military may not be used to quell civil rebellion unless so ordered by the President.⁸⁴

11. The military may not be used to assist civil authorities merely because a government official has been victimized.⁸⁵

12. Conducting military maneuvers in a specific area at the request of civil authorities in an attempt to interdict drug traffic is merely an attempt to circumvent

the Posse Comitatus Act, and is unlawful.⁸⁶

13. Military investigators may not be used by the Department of Justice to investigate civil fraud cases against the military. Military expertise in contractor fraud against the military is not sufficient to violate Posse Comitatus.⁸⁷

14. Outside the installation boundaries, the military may not exercise jurisdiction over anyone other than military personnel.⁸⁸

15. Military personnel may not assume or be delegated the President's authority to order federal troops to suppress domestic violence.⁸⁹

16. Military police may not perform duty as "joint patrol" with civil police if the objective is to use the military to assist in enforcing civil law.⁹⁰

17. The military may not conduct lie detector examinations on civilian or military personnel for the sole purpose of providing information to civil authorities.⁹¹

18. The military may not be used to guard civilian prisoners in civilian jails or penitentiaries.⁹²

19. The military may not provide crowd control at civilian parades.⁹³

20. The military may not provide traffic control off of the military installation.⁹⁴

21. Blood tests may not be taken from either

civilians or military personnel solely to provide the results to civil authorities.⁹⁵

22. Military police may not be dispatched off the installation to provide protection for nonmilitary funds, even if the funds are originating from the installation or are being delivered to an installation.⁹⁶

23. Military personnel should not be used as game wardens on base to enforce either state or federal hunting laws.⁹⁷

24. Military medical personnel may not perform physical examinations solely to provide the results to civil authorities.⁹⁸

25. Military personnel may not pursue or arrest repelled attackers of military priority resources outside the immediate vicinity of those resources.⁹⁹

26. Military personnel may not provide otherwise authorized assistance to civil authorities if such assistance will result in decreased military preparedness.¹⁰⁰

27. Military personnel who are providing civilian law enforcement assistance under the provisions of the Department of Defense Appropriations Act of 1982, may not actively participate in interdiction of vessels or aircraft or arrests, searches, seizures, or similar direct active assistance.¹⁰¹

Conclusions

As the two preceding lists show, the prohibitions against the military providing assistance to civilian law enforcement agencies are not as "iron clad" as one might anticipate by reading the Posse Comitatus Act. Through court decisions, legal opinions, and legislation, there are over twice the number of authorizations than prohibitions. Furthermore, the lack of criminal prosecutions for violation of the Posse Comitatus Act lend the appearance of unenforcability to this law. Military personnel should not become complacent because of this nonuse, however. There is always the possibility that the civil courts will grow weary of Posse Comitatus violations and will begin to push civil prosecutors to file charges for these violations.

In order to protect military personnel who are faced with the opportunity to assist civil law enforcement and thereby violate the Posse Comitatus Act, the military services should provide a list similar to the ones above for use in the field. Furthermore, the military should provide annual updates, as a minimum, in order to keep abreast of the changing laws and legal decisions which are prevalent in this country.

As this study has shown, the military is allowed to assist civil law enforcement in numerous manners. For military commanders to arbitrarily deny assistance out of

fear or ignorance of the Posse Comitatus Act denies a portion of the resources available to fight crime in the United States. This may have the detrimental effect of weakening the crime fighting capabilities necessary to provide a safe environment in which to live. To negate a portion of our capabilities is to provide increased opportunities to those who would violate the law.

Need For Further Study

In addition to the previously mentioned annual updating to decisions relating to Posse Comitatus, an additional study of the use of military in foreign countries should be undertaken.

The United States appears to have limited military assistance to areas such as drug interdiction whereas other countries such as Great Britain and the Federal Republic of Germany give the military an active role in such areas as counter terrorist activities. Studies of other possible uses of the military may reveal several areas in which the United States can make better use of its military resources without placing them in positions of authority which are normally abhorrent to our society.

NOTES

- ¹ In re Neagle, 135 U.S. 1, (1895).
- ² Hirabayashi v. U.S., 320 U.S. 81, 93, (1943).
- ³ Chandler v. U.S., 171 F. 2d 921, (1st Cir. 1949).
- ⁴ Gillers v. U.S., 182 F. 2d 962, (D.C. Cir. 1950).
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- ⁷ Cafeteria Workers Union v. McElroy, 367 U.S. 886,
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- ²⁴ U.S. v. Banks, loc. cit.
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- ²⁶ Ibid.
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- ²⁸ JAGAF 1976/72, 5 Oct 1976.
- ²⁹ U.S. v. Banks, loc. cit.
- ³⁰ N.C. v. Trueblood, 256 S.E. 2d 662, (N.C. Crim. App. 1980).
- ³¹ Ibid.
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- 36 N.C. v. Sanders, 281 S.E. 2d 7, (N.C. Sup. Ct. 1981).
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- 38 Ibid.
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- 40 19 Op. Atty. Gen. 570 (1890).
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- 43 In re Debs, 158 U.S. 564, 582, (1895).
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- 45 Rehnquist, loc. cit.
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- 47 William H. Rehnquist to Robert E. Jordan III, U.S. Attorney General Opinion, 11 May 1970, U.S., Cong., House, Committee on the Judiciary, Subcommittee on Crime,

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⁴⁸ U.S. v. Curtiss-Wright Export Corp., 229 U.S. 304, (1936).

⁴⁹ William H. Rehnquist to Benjamin Forman, U.S. Attorney General Opinion, 30 Sep 1971, U.S., Cong., House, Committee on the Judiciary, Subcommittee on Crime, Posse Comitatus Act, Hearing, 97th Cong., 1st sess., 3 June 1981 (Washington, D.C.: GPO, 1982), p. 564.

⁵⁰ William H. Rehnquist to Robert E. Jordan III, U.S. Attorney General Opinion, 24 Nov 1969, U.S., Cong., House, Committee on the Judiciary, Subcommittee on Crime, Posse Comitatus Act, Hearing, 97th Cong., 1st sess., 3 June 1981), p. 572, 576.

⁵¹ JAG 370.6, 17 May 1930.

⁵² JAG 537.9, 24 Sep 1919.

⁵³ JAGA 1952/4810, 26 May 1952.

⁵⁴ JAG 253.5, 14 Jun 1922.

⁵⁵ N.C. v. Sanders, loc. cit.

⁵⁶ JAGA 1953/6465, 25 Aug 1953.

⁵⁷ Ibid.

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