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## THE POSSE COMITATUS ACT AS AN EXCLUSIONARY RULE: IS THE CRIMINAL TO GO FREE BECAUSE THE SOLDIER HAS BLUNDERED?

### I. INTRODUCTION — THE POSSE COMITATUS ACT

Congress passed the Posse Comitatus Act<sup>1</sup> in the political heat of the Civil War reconstruction period to stop the use of military troops as a means of law enforcement in the South.<sup>2</sup> The Posse Comitatus Act makes the willful use “of any part of the Army or the Air Force” to execute civilian laws a criminal offense.<sup>3</sup> The Act’s proscription excludes, however, actions expressly authorized by the Constitution<sup>4</sup> or a federal statute.<sup>5</sup>

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1. Act of June 18, 1878, ch. 263, 20 Stat. 145 (current version at 18 U.S.C. § 1385 (1982)). In its present form, the Posse Comitatus Act provides as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

*Id.*

2. See Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 93-95 (1960). For a general discussion of the history of the Posse Comitatus Act, see *infra* text accompanying notes 16-42.

3. 18 U.S.C. § 1385 (1982).

4. *Id.* The only exception to the Act expressly authorized by the Constitution is contained in article IV, § 4. That provision obligates the United States to guarantee each state a republican form of government, to protect each state from invasion, and to protect any state requesting assistance from domestic violence. U.S. CONST. art. IV, § 4. Beyond express authority, one commentator has suggested that the Posse Comitatus Act would be unconstitutional if applied to restrict the President from using his implied constitutional authority to use the military to execute the laws in certain situations. See Furman, *supra* note 2, at 91-92.

5. 18 U.S.C. § 1385 (1982). Express statutory exceptions to the Posse Comitatus Act include: 10 U.S.C. §§ 331-36 (1982) (use of military to quell civil disorders); 10 U.S.C. §§ 371-75 (1982) (limited military cooperation with civilian law enforcement officials); 10 U.S.C. §§ 801-940 (1982) (Uniform Code of Military Justice); 16 U.S.C. §§ 23, 78 (1982) (use of military to protect federal

The term "posse comitatus" means the entire population of a county above the age of fifteen, which a sheriff may summon for assistance in the performance of his duties.<sup>6</sup> The Posse Comitatus Act appears to have derived its name from the use of military troops as a posse comitatus to assist federal marshals in the performance of their duties under the Judiciary Act of 1789.<sup>7</sup>

Although the Posse Comitatus Act has been law for more than a century,<sup>8</sup> the reported decisions do not contain a single case involving a prosecution for a violation of the Act.<sup>9</sup> The reported decisions, however, contain cases in which criminal defendants contend that evidence should be excluded from trial because it was obtained as a result of a violation of the Posse Comitatus Act.<sup>10</sup> This note will discuss the historical perspective of the Posse Comitatus Act, criteria for determining when the Act has been violated, and the approaches taken by courts with respect to the use of the Act as an exclusionary rule.

## II. HISTORY OF THE POSSE COMITATUS ACT

Early Americans despised standing armies<sup>11</sup> and relied upon a militia system until 1789 when Congress authorized a small army.<sup>12</sup> In 1789 Congress also passed the first legislation authorizing the use of the posse comitatus.<sup>13</sup> That legislation took the form of the Judiciary Act of 1789, which authorized federal marshals to "command all necessary assistance in the execution of [their] dut[ies]." <sup>14</sup> Although the practice was not expressly authorized by

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parks); 18 U.S.C. § 351 (1982) (use of military to protect members of Congress from crimes against them); 18 U.S.C. § 831 (1982) (use of military to enforce prohibition against transactions involving nuclear materials); 18 U.S.C. § 1751 (1982) (use of military to protect the President from crimes against him); 22 U.S.C. §§ 408, 461-62 (1982) (use of military to enforce the neutrality laws); 42 U.S.C. § 1989 (1982) (use of military to execute warrants relating to certain violations of the civil rights laws); 43 U.S.C. § 1065 (1982) (use of military to remove unlawful enclosures from public lands); 50 U.S.C. § 220 (1976) (use of military to enforce the customs laws).

6. BLACK'S LAW DICTIONARY 1046 (rev. 5th ed. 1979).

7. See FURMAN, *supra* note 2, at 87. For a general discussion of the posse comitatus and the Judiciary Act of 1789, see *infra* text accompanying notes 13-15.

8. See *infra* text accompanying note 42.

9. See H. R. REP. NO. 71, Part II, 97th Cong., 1st Sess. 5 (1981), reprinted in 1981 U.S. CODE CONG. & AD. NEWS 1785, 1787. This report states that no one has ever been charged with a violation of the Posse Comitatus Act. *Id.*

10. See, e.g., United States v. Walden, 490 F.2d 372, 373 (4th Cir.) (defendants unsuccessfully contended that evidence should be excluded because of violation of Posse Comitatus Act), cert. denied, 416 U.S. 983 (1974); Taylor v. State, 645 P.2d 522, 523, 525 (Okla. Crim. App. 1982) (defendant successfully contended that evidence should be excluded because of violation of Posse Comitatus Act).

11. See The Declaration of Independence para. 13 (U.S. 1776). The Declaration of Independence protested that the "King has kept among us, in times of peace standing armies." *Id.*

12. See Act of Sept. 29, 1789, ch. 25, 1 Stat. 95 (repealed 1790); see generally FURMAN, *supra* note 2, at 92-93 (discussion of use of army from 1789 to 1879).

13. See Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87 (repealed in part 1948). Section 27 of the Judiciary Act provided generally for the appointment of federal marshals. *Id.*

14. *Id.* The full language of this portion of section 27 of the Judiciary Act provided as follows:

the Act, federal marshals regularly summoned military troops as a posse comitatus.<sup>15</sup>

The policy of using military troops to execute civil laws gained momentum and became a critical issue during the Civil War reconstruction period.<sup>16</sup> After the Civil War, Congress passed the Reconstruction Act of 1867.<sup>17</sup> The Reconstruction Act established military districts governed by military commanders in the defeated Southern states.<sup>18</sup> Although the Southerners conceded the initial necessity for military occupation, they resented the use of military troops to execute the laws.<sup>19</sup> Military troops were used to aid revenue officers in suppressing illegal whiskey production, to aid local officials in subduing labor disturbances, and to keep guard at polling places.<sup>20</sup>

Although all the Southern states were restored to the Union by mid-1870,<sup>21</sup> the use of military troops to execute the laws in the South continued.<sup>22</sup> In 1871 Congress passed the Ku Klux Klan Act,<sup>23</sup> which authorized the President to use the military and other means to suppress insurrection and domestic violence.<sup>24</sup> Under the authority of this Act, President Grant sent troops into South Carolina to apprehend Klansmen and later suspended the writ of habeas corpus throughout much of that state.<sup>25</sup>

In 1872 Congress passed the General Amnesty Act,<sup>26</sup> which removed the political disabilities of most of the people excluded from political office by the fourteenth amendment.<sup>27</sup> Passage of this

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“[The federal marshals] shall have power to command all necessary assistance in the execution of [their] dut[ies], and to appoint as there shall be occasion, one or more deputies . . .” *Id.*

15. Furman, *supra* note 2, at 87.

16. Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 89 (1975).

17. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

18. *See id.* §§ 1-3, 14 Stat. at 428.

19. Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703, 705-06 (1976). The Southerners believed that the Northern Republicans were using military troops to suppress the evolution of politics in the South. *Id.*

20. Meeks, *supra* note 16, at 90.

21. A. SCHLESINGER, *POLITICAL AND SOCIAL HISTORY OF THE UNITED STATES* 247 (1925).

22. Meeks, *supra* note 16, at 89.

23. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (current version at 10 U.S.C. § 333 (1982)).

24. *See id.* § 3, 17 Stat. at 14. Section 3 of the Ku Klux Klan Act generally authorized the president to employ military troops to suppress any insurrections or domestic violence that deprived any class of people of their constitutional rights or that obstructed the execution of the laws of the United States. *Id.*

25. 5 W. WILSON, *A HISTORY OF THE AMERICAN PEOPLE* 75-76 (1902).

26. Act of May 22, 1872, ch. 193, 17 Stat. 142. The General Amnesty Act provided as follows:

[A]ll political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

*Id.*

27. *See id.*; U.S. CONST. AMEND XIV, § 3. Section 3 of the fourteenth amendment generally

Act permitted a Democratic recovery in the South, and by 1874 Democrats had control of the House of Representatives.<sup>28</sup> In 1876 Samuel J. Tilden, a Democrat, opposed Rutherford B. Hayes, a Republican, in the presidential election.<sup>29</sup> After the balloting for this election, President Grant ordered troops into three Southern states to guard the legal boards of canvassers.<sup>30</sup> The election outcome revealed that Tilden needed one more electoral vote to win and Hayes needed twenty.<sup>31</sup> Twenty electoral votes were in dispute, and nineteen of those votes came from the states to which troops were sent.<sup>32</sup> Congress established a special electoral commission to settle the controversy.<sup>33</sup> The commission awarded Hayes all twenty disputed electoral votes and accordingly elected Hayes president.<sup>34</sup> The Democrats were bitter and partly blamed the use of troops for Tilden's loss.<sup>35</sup>

The outcome of the 1876 presidential election prompted the proposal and passage of the Posse Comitatus Act.<sup>36</sup> Soon after the election the Democratic House of Representatives passed the forerunner of the Posse Comitatus Act as an amendment to an Army appropriations bill.<sup>37</sup> In essence, the amendment provided that the funds to be appropriated for the Army were not to be used for military interference in the South.<sup>38</sup> The Republican Senate disagreed with the amendment, however, and the congressional session ended with no funds being appropriated for the Army.<sup>39</sup> During the next session the Democratic House again voted to amend the Army appropriations bill by including a prohibition against using the military in a law enforcement role.<sup>40</sup> The Senate

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prohibits a person who takes an oath as a public official to support the Constitution and then engages in insurrection or rebellion against the United States from holding a state or federal office. *Id.*

28. Furman, *supra* note 2, at 94.

29. 5 W. WILSON, *supra* note 25, at 104.

30. 9 E. WILEY & I. RINES, THE UNITED STATES 474 (1913).

31. *Id.* at 473.

32. *Id.* at 473-74.

33. 5 W. WILSON, *supra* note 25, at 110. The Commission consisted of five Democrats and five Republicans from Congress, two Democrats and two Republicans from the Supreme Court, and an additional Supreme Court justice selected by the other four Supreme Court justices. *Id.*

34. *Id.* at 111-12.

35. Meeks, *supra* note 16, at 91.

36. Furman, *supra* note 2, at 95.

37. Note, *supra* note 19, at 708.

38. 5 CONG. REC. 2119 (1877). The proposed amendment recited that no part of the money appropriated for the Army could be used to support conflicting claims of specified individuals with regard to positions in the Louisiana executive, legislative, and judicial branches. *Id.* Having recited these restrictions concerning Louisiana, the proposed amendment continued: "Nor shall the Army . . . be used in support . . . of any state government, or officer thereof, . . . until the same shall have been duly recognized by Congress. . . ." *Id.*

39. Meeks, *supra* note 16, at 91-92.

40. 7 CONG. REC. 3845 (1878). This proposed amendment recited as follows:

From and after the 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 under the pretext or for

made changes to the amendment, but after a joint committee conference a version acceptable to both houses was passed.<sup>41</sup> President Hayes signed the legislation on June 18, 1878, and the Posse Comitatus Act became law.<sup>42</sup>

### III. USE OF THE POSSEE COMITATUS ACT AS AN EXCLUSIONARY RULE

#### A. CRITERIA FOR FINDING VIOLATIONS OF THE ACT: A SYNTHESIS OF THE CASE LAW

Before discussing the exclusion of evidence based upon a violation of the Posse Comitatus Act, it is necessary to establish what constitutes a violation of the Act.<sup>43</sup> At first glance, the cases interpreting the Act appear discordant. A close analysis of the cases, however, reveals criteria for determining when the Act is violated. The first cases to be considered are those in which a court has found a violation of the Act.

##### 1. *Wrynn v. United States*

The first case in which a violation of the Act was found is *Wrynn v. United States*.<sup>44</sup> In *Wrynn* a sheriff asked the commanding officers of an Air Force base for assistance in the search for an

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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 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 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.

*Id.*

41. See *id.* at 4239, 4248, 4295-4307, 4358, 4647-48, 4685-86, 4719.

42. See Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152 (current version at 18 U.S.C. § 1385 (1982)). The original version of the Posse Comitatus Act provided as follows:

From and after the 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 wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.

*Id.*

43. See *Harker v. State*, 663 P.2d 932, 935 (Alaska 1983) (court did not consider whether evidence should be excluded since Act had not been violated).

44. 200 F. Supp. 457 (E.D.N.Y. 1961).

escaped civilian prisoner.<sup>45</sup> The commanding officers offered the services of a helicopter and its crew and the sheriff accepted.<sup>46</sup> The officers at the base instructed the crew to work at the disposal of the sheriff.<sup>47</sup> At the site of the search, the crew flew the helicopter in accordance with hand signals given to them by policemen on the ground.<sup>48</sup> The crew also took two civilian authorities aboard and maintained radio contact with civilian authorities on the ground.<sup>49</sup> When the crew landed the helicopter, the whirling rotor blades struck a tree, hurling large splinters of wood into Wrynn's leg.<sup>50</sup> Wrynn subsequently filed suit against the United States Government to recover for his injuries.<sup>51</sup>

In federal district court the issue of whether the crew members were acting as agents of the government was raised.<sup>52</sup> The court held that the crew members violated the Posse Comitatus Act and thus were not acting within the scope of their employment.<sup>53</sup> The district court stated that the dissimilarity between the use of the Air Force in the case to the uses of the military that occasioned the statute's enactment was irrelevant, since the statute is "absolute in its command and explicit in its exceptions."<sup>54</sup>

Note that the court in *Wrynn* found a violation of the Posse Comitatus Act without articulating the grounds upon which its decision rested.<sup>55</sup> This absence of articulation appears also to be a trait of the three other cases in which a violation of the Act has been found.

## 2. *United States v. Walden*

In *United States v. Walden*<sup>56</sup> three marines worked as undercover investigators at the request of a special investigator of the United States Treasury Department.<sup>57</sup> The court held that this activity

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45. *Wrynn v. United States*, 200 F. Supp. 457, 458 (E.D.N.Y. 1961).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 459.

50. *Id.* at 460-61. Wrynn was a bystander not engaged in the search. *Id.* at 459. The helicopter's rotor blades struck the tree after a car passed into the descending helicopter's path of flight. *Id.* at 460.

51. *Id.* at 458. Wrynn contended that the pilots were negligent in selecting a risky landing site, in rejecting a safer landing site, and in mismanaging the helicopter after the car passed under it. *Id.* at 461.

52. *Id.* at 463-65.

53. *Id.* at 465. The *Wrynn* court stated that because of the violation of the Posse Comitatus Act, "there was . . . no activity that could be authorized, no legally cognizable 'scope of employment' to which the questioned conduct could be related." *Id.*

54. *Id.*

55. *See id.*

56. 490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).

57. *United States v. Walden*, 490 F.2d 372, 373 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974). In

violated the spirit of the Posse Comitatus Act and a Navy regulation implementing the policy of the Act.<sup>58</sup> The court stated only that its "interpretation of the . . . letter and spirit of the Posse Comitatus Act and the Navy regulation . . . [was] influenced by the traditional American insistence on exclusion of the military from civilian law enforcement."<sup>59</sup>

### 3. *State v. Danko*

In *State v. Danko*<sup>60</sup> the court held that the Posse Comitatus Act was violated when a military policeman assisted a civilian policeman in the search of the defendant's car.<sup>61</sup> The court did not articulate the grounds upon which its decision rested, but stated simply that the conduct of the two policemen constituted a technical violation of the Act.<sup>62</sup>

### 4. *Taylor v. State*

Finally, in *Taylor v. State*<sup>63</sup> a military policeman made an undercover drug purchase from the defendant, pulled a gun during his arrest, and participated in the search of his house.<sup>64</sup> The court did not directly discuss whether the Posse Comitatus Act had been

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the course of their mission the marines purchased firearms from the defendants who were selling them in violation of federal firearms statutes. *Id.* at 373. The defendants were convicted of violating those statutes and appealed. *Id.* On appeal the defendants contended that the testimonial evidence produced by the marines' investigation should have been excluded at trial because the investigation violated a Navy regulation and the Posse Comitatus Act. *Id.*

58. *Id.* at 374. The Navy regulation provided as follows:

"Throughout the United States, it is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order. In the Federal Government this policy is reflected by the Posse Comitatus Act (18 U.S.C. § 1385) which prohibits the use of any part of the Army or Air Force to enforce local, state, or Federal laws except as Congress may authorize. Although not expressly applicable to the Navy and Marine Corps, that act is regarded as a statement of Federal policy which is closely followed by the Department of the Navy."

*Id.* at 373. (quoting SECNAVINST 5400.12 (Jan. 17, 1969)).

59. *Id.* at 376. Although the court found a violation of the Navy regulation, it refused to apply an exclusionary rule. *Id.* at 376-77. See *infra* text accompanying notes 176-189.

60. 219 Kan. 490, 548 P.2d 819 (1976).

61. *State v. Danko*, 219 Kan. 490, 491, 493, 548 P.2d 819, 821-22 (1976). The military policeman accompanied the civilian policeman on patrol in a city with a military base located nearby. *Id.* at 490, 548 P.2d at 820. At the request of the civilian policeman, the military policeman helped search a suspected get-away car. *Id.*, at 491, 548 P.2d at 820. The military policeman uncovered a pistol and the civilian policeman arrested the defendants. *Id.* at 491, 548 P.2d at 820-21. The defendants argued that the search violated the Posse Comitatus Act and that the violation required the exclusion of all the evidence obtained as a result of the search. *Id.* at 491, 548 P.2d at 821.

62. *Id.* at 493, 548 P.2d at 821-22. Although the court found a violation of the Posse Comitatus Act, it refused to apply an exclusionary rule. *Id.* at 497-98, 548 P.2d at 825.

63. 645 P.2d 522 (Okla. Crim. App. 1982).

64. *Taylor v. State*, 645 P.2d 522, 523, 525 (Okla. Crim. App. 1982).



violated. Instead, the court focused on the issue of whether a violation of the Act necessitated the application of an exclusionary rule.<sup>65</sup> The court held that under the facts of the case, the application of an exclusionary rule was warranted.<sup>66</sup> Hence, the court implicitly found that the Act had been violated in the first instance.

In summary, a violation of the Posse Comitatus Act has been found in four cases. In none of those cases, however, did the court articulate the grounds upon which its decision rested. As a result, the decisions of those courts are of little value in formulating criteria for determining when the Act is violated. Courts in other cases have found no violation of the Act, but have articulated varying rationales.<sup>67</sup> Most of these rationales can be reconciled, however, to form criteria for determining when the Act is violated.

#### B. THE WOUNDED KNEE CASES: THREE TESTS FOR DETERMINING WHETHER THE MILITARY HAS EXECUTED THE LAWS

Three tests for determining whether the military has executed the laws in violation of the Posse Comitatus Act arose out of the cases addressing the military involvement in law enforcement activities during the 1973 Wounded Knee uprising.<sup>68</sup> Although these cases address the use of the Act to challenge burden of proof requirements, the legal constructions given the Act should be relevant to the situation in which evidence is sought to be excluded.<sup>69</sup>

##### 1. *United States v. Jaramillo*

In *United States v. Jaramillo*<sup>70</sup> the defendants attempted to enter Wounded Knee, South Dakota, when members of the American

65. *Id.* at 524-25.

66. *Id.* at 525; see *infra* text accompanying notes 190-199.

67. Compare, e.g., *People v. Burden*, 411 Mich. 56, 61, 303 N.W.2d 444, 447 (1981) (per curiam) (no violation because assistance rendered authorities was civilian rather than military in nature) with *State v. Nelson*, 298 N.C. 573, \_\_\_, 260 S.E.2d 629, 639 (1979) (no violation because military involvement was justified by a military purpose).

68. See *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1976) ("regulatory, proscriptive or compulsory use" test), *aff'd sub. nom. United States v. Casper*, 541 F.2d 1275, 1277 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977); *United States v. Red Feather*, 392 F. Supp. 916, 924 (D.S.D. 1975) ("direct active use" test); *United States v. Jaramillo*, 380 F. Supp. 1375, 1379 (D. Neb. 1974) ("pervasive use" test), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

69. See *United States v. Hartley*, 486 F. Supp. 1348, 1356-57 (M.D. Fla. 1980) (considered application of all three tests), *aff'd*, 678 F.2d 961 (1982), *cert. denied*, 459 U.S. 1170 (1983). *But cf. Harker v. State*, 663 P.2d 932, 935 n.4 (Alaska 1983) (Wounded Knee cases factually distinguishable and of little assistance); *People v. Blend*, 121 Cal. App. 3d 215, 225, 175 Cal. Rptr. 263, 269 (1981) (Wounded Knee cases factually distinguishable and of little assistance).

70. 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

Indian Movement occupied that village.<sup>71</sup> As a result of their attempt, the defendants were charged with impeding law enforcement.<sup>72</sup> In order to find the defendants guilty, one of the elements the prosecution had to prove beyond a reasonable doubt was that the law enforcement officers were performing their duties lawfully.<sup>73</sup> In order to disprove this element, the defense attempted to show that the military involvement at Wound Knee violated the Posse Comitatus Act and, therefore, rendered the activities of the law enforcement officers unlawful.<sup>74</sup>

The defense introduced evidence at the *Jaramillo* trial that during the occupation of Wounded Knee, the Army furnished weapons and supplies to the United States marshals and FBI agents conducting operations there.<sup>75</sup> In addition, the Nebraska National Guard made at least one aerial reconnaissance at the request of the law enforcement officials.<sup>76</sup> Two Army officers and Army maintenance personnel were also present at Wounded Knee.<sup>77</sup> Of the two Army officers, one's mission was to keep an inventory of the military weapons and equipment; the other's was to monitor developments for the purpose of advising the Department of Defense on the possibility of committing federal troops.<sup>78</sup> This Army officer also counseled the law enforcement officers on civil disorder tactics.<sup>79</sup> He suggested the substitution of a shoot-to-wound policy for a shoot-to-kill policy and urged negotiations with the occupiers of Wounded Knee.<sup>80</sup> Furthermore, he required the law enforcement officers to follow his instructions in using armored personnel carriers.<sup>81</sup>

The United States District Court for the District of Nebraska, upon reviewing this evidence, concluded that the use of military supplies and equipment did not violate the Posse Comitatus Act.<sup>82</sup> The court based this conclusion on the existence of a federal act intended to encourage the sharing of federal equipment and

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71. *United States v. Jaramillo*, 380 F. Supp. 1375, 1376 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

72. *Id.*

73. *Id.*

74. *Id.* at 1378.

75. *Id.* at 1379.

76. *Id.* at 1380. The National Guard is a part of the Army while in service of the United States. 10 U.S.C. § 3078 (1982). When not in service of the United States, the National Guard serves as a militia and is not within the scope of the Posse Comitatus Act. *See* 10 U.S.C. §§ 311-12 (1982); 18 U.S.C. § 1385 (1982). The court in *Jaramillo* did not consider whether the National Guard had been federalized, but assumed it was part of the Army. 380 F. Supp. at 1380-81.

77. *Jaramillo*, 380 F. Supp. at 1379.

78. *Id.* at 1379-80.

79. *Id.* at 1379.

80. *Id.*

81. *Id.* at 1380.

82. *Id.* at 1379.

supplies among the various branches of the government.<sup>83</sup> Additionally, the court noted that the Act could not be read as precluding the use of military supplies and equipment and that Congress never mentioned prevention of their use in the congressional debates.<sup>84</sup>

With regard to the use of military personnel, the court stated that the "critical question" was the degree to which they were used.<sup>85</sup> According to the court, military personnel are used to execute the laws in violation of the Posse Comitatus Act when their use pervades the activities of civilian law enforcement officers.<sup>86</sup> The court found that the Army officer's advice affected the operations at Wounded Knee and that the maintenance personnels' services contributed materially to those operations.<sup>87</sup> Hence, the court concluded that, as a question of fact, there was a reasonable doubt whether the law enforcement officers performed their duties lawfully.<sup>88</sup> The court emphasized that it did not find a violation of the Act, but only that the prosecution failed to meet its burden of proof.<sup>89</sup>

Thus, according to *Jaramillo*, military personnel are used to execute the laws in violation of the Posse Comitatus Act when their use pervades the activities of civilian law enforcement officers.<sup>90</sup> This test appears to encompass situations in which military personnel merely influence civilian law enforcement officers in the performance of their duties.<sup>91</sup> The *Jaramillo* "pervasive use" test has been praised for being consistent with the letter of the Act and

83. *Id.*

84. *Id.* The *Jaramillo* court explained that the congressional debates reveal "that the term 'any part of the Army or Air Force' refers to any unit of troops, whatever its size or designation." *Id.* The court then stated: "It is the use of military personnel, not material, which is proscribed by the [Posse Comitatus Act]." *Id.*

85. *Id.*

86. *Id.* The *Jaramillo* court stated as follows:

If there was "use" of "any part of the Army or the Air Force" to "execute the laws" and if that use pervaded the activities of the United States marshals and the Federal Bureau of Investigation agents, the marshals and the agents cannot be said to have been "lawfully engaged" in the "lawful performance" of their official duties.

*Id.*

87. *Id.* at 1381. The *Jaramillo* court pointed out, however, that "[b]eyond a reasonable doubt the aerial reconnaissance was of no usefulness to the law enforcement officers." *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1379. See also *United States v. Banks*, 383 F. Supp. 368, 377 (D.S.D. 1974) (court followed the *Jaramillo* ruling).

91. See *Jaramillo*, 380 F. Supp. at 1380. In considering the evidence of the military involvement at Wounded Knee, the court in *Jaramillo* asked the following question: "[W]as the presence of military personnel a mere presence which did not influence the Department of Justice personnel in their decisions?" *Id.*

its legislative history.<sup>92</sup> It has also been criticized, however, for being too vague to apply.<sup>93</sup>

## 2. *United States v. Red Feather*

The facts in *United States v. Red Feather*<sup>94</sup> were essentially the same as those in *Jaramillo*. In *Red Feather*, however, there was a procedural variation. The government filed a motion *in limine* anticipating the defendants' plan to introduce evidence to prove that the law enforcement officers violated the Posse Comitatus Act and thus were not performing their duties lawfully.<sup>95</sup> The government's motion *in limine* raised the issue whether evidence relating to the military involvement at Wounded Knee would be relevant to prove that the law enforcement officers were not performing their duties lawfully.<sup>96</sup>

The United States District Court for the District of South Dakota, like the court in *Jaramillo*, concluded that the use of military supplies and equipment did not violate the Posse Comitatus Act.<sup>97</sup> Accordingly, the court held that evidence relating to the use of military supplies and equipment was irrelevant and inadmissible.<sup>98</sup>

The *Red Feather* court then considered what evidence of involvement by military personnel would be admissible at trial.<sup>99</sup> The court determined that Congress intended "to make unlawful the direct active participation of federal military troops in law enforcement activities . . . [and] did not intend to make unlawful the involvement of federal troops in a passive role. . . ." <sup>100</sup> Hence, the court concluded that evidence relating to the direct active use of military personnel was relevant and admissible while evidence

92. See Meeks, *supra* note 16, at 122-23. The author explained that *Jaramillo* and *Banks* "accurately reflect the legislative intent behind the Posse Comitatus Act" since the Act "prohibits all execution of civil law except where specifically authorized by Congress or the Constitution." *Id.* at 122. The author also stated that "the history of the Act [does not] support the argument that only active aid is prohibited." *Id.* at 122-23.

93. See *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1976), *aff'd sub. nom.* *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977). Judge Van Sickle of the Federal District Court for the District of North Dakota stated that his concern with the "pervasive use" test was that it "requires a judgment to be made from too vague a standard." *Id.*

94. 392 F. Supp. 916, 918-20 (D.S.D. 1975).

95. *United States v. Red Feather*, 392 F. Supp. 916, 920 (D.S.D. 1975).

96. *Id.*

97. *Id.* at 923.

98. *Id.* at 924. The court in *Red Feather* stated that this holding was supported by common sense because many small governmental units do not have inventories of supplies and equipment adequate to meet natural disasters and civil disorders. *Id.* The court explained that it would do violence to the intent of Congress in passing the Posse Comitatus Act to hold that those arrested for criminal acts during a civil disorder should be "released because law enforcement officers were using military equipment to aid in executing the law." *Id.*

99. *Id.*

100. *Id.*

relating to the passive use of military personnel was irrelevant and inadmissible.<sup>101</sup> In order to demonstrate what constitutes an active role of direct law enforcement, the court listed several activities as examples: “arrest; seizure of evidence; search of a person; search of a building; investigation of a crime; interviewing witnesses; pursuit of an escaped civilian prisoner; [and] search of an area for a suspect . . . .”<sup>102</sup> In contrast, the court listed examples of passive activities that would only indirectly aid law enforcement.<sup>103</sup> These activities include the activities performed by the military personnel at Wounded Knee, such as giving tactical advice to civilian law enforcement officers and maintaining military equipment.<sup>104</sup>

The court’s holding in *Red Feather* that the Posse Comitatus Act is violated only when there is a direct active use of military personnel to execute the laws has received inconsistent reviews. One commentator has criticized the *Red Feather* “direct active use” test as not being supported by either the letter of the Act or its legislative history.<sup>105</sup> Another commentator, however, has praised the test for being just the opposite — consistent with the Act’s letter and spirit as well as its legislative history.<sup>106</sup>

### 3. *United States v. McArthur*

In *United States v. McArthur*<sup>107</sup> the United States District Court for the District of North Dakota reconsidered the posse comitatus issue presented in *Red Feather*.<sup>108</sup> The court in *McArthur* found that

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101. *Id.* at 925.

102. *Id.*

103. *Id.* The court in *Red Feather* listed the following activities as examples of passive activities that would only indirectly aid law enforcement:

[M]ere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such materiel or equipment, and to maintain such materiel or equipment; aerial photographic reconnaissance flights and other like activities.

*Id.*

104. *Id.*

105. See Meeks, *supra* note 16, at 122-23.

106. See Note, *supra* note 19, at 730. The author states that the congressional debates over the Posse Comitatus Act reveal a desire to “develop local capabilities to handle local problems.” *Id.* The “direct active use” test, the author reasons, would allow the military to assist small governmental units in a passive role without violating the Act. *Id.* The author points out that this passive assistance may help governmental units handle their own problems without the need for the commitment of military troops pursuant to constitutional or statutory authority. *Id.*

107. 419 F. Supp. 186 (D.N.D. 1976), *aff’d sub. nom.* *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

108. *United States v. McArthur*, 419 F. Supp. 186, 189 n. 1 (D.N.D.), *aff’d sub. nom.* *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977). *McArthur* was one of

the evidence of military activity was admissible as going to the prosecution's proof on the element of the crime requiring the law enforcement officers to have been performing their duties lawfully.<sup>109</sup> In deciding whether the evidence of military activity created a reasonable doubt on this element, the court developed yet another test for determining what constitutes an execution of the laws in violation of the Posse Comitatus Act.<sup>110</sup>

The test the *McArthur* court applied was whether the civilian law enforcement officers used the military personnel in a manner that "subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively."<sup>111</sup> In applying its test the court noted that both *Jaramillo* and *Red Feather* concluded that use of military supplies and equipment did not violate the Posse Comitatus Act.<sup>112</sup> The court then reasoned that the policy of sharing federal equipment and supplies among branches of the government extended to expert advisors.<sup>113</sup> The Army officer's tactical advice, the court stated, "was borrowed as a vehicle might be borrowed."<sup>114</sup> The court also noted that the presence of Army officers at Wounded Knee for the purpose of preparing for possible military action pursuant to a Presidential order was inconsistent with a violation of the Act.<sup>115</sup> This preparation could not be "equated to the actual use by civilian authorities of a part of the Army or Air Force to execute the laws."<sup>116</sup> Hence, the court concluded that the evidence of military activity did not taint a "presumption that [the] law enforcement officers were acting in performance of their duties."<sup>117</sup>

Thus, the *McArthur* court held that military personnel are used to execute the laws in violation of the Posse Comitatus Act when

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several cases transferred from the District of South Dakota to the District of North Dakota pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure. *Id.* at 189 & n.1. Rule 21(b) specifies as follows: "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district." FED. R. CRIM. P. 21.

109. 419 F. Supp. at 194.

110. *Id.* The *McArthur* court refused to adopt either the *Jaramillo* "pervasive use" test or the *Red Feather* "direct active use" test. *Id.* The *McArthur* court criticized the *Jaramillo* "pervasive use" test for being too vague to apply, *see supra* note 93, and criticized the *Red Feather* "direct active use" test for being too mechanical. 419 F. Supp. at 194.

111. 419 F. Supp. at 194. The *McArthur* court stated that "the feared use 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." *Id.*

112. *Id.*

113. *Id.* at 195.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

their use is regulatory, proscriptive, or compulsory in nature.<sup>118</sup> In developing this test the court in *McArthur* criticized the “direct active use” test developed in *Red Feather* for being too mechanical.<sup>119</sup> It appears, however, that the only difference between the “direct active use” test and the “regulatory, proscriptive or compulsory use” test is the words describing them. In both cases the courts concluded that the passive role played by the military personnel at Wounded Knee did not constitute an execution of the laws in violation of the Act.<sup>120</sup> Furthermore, to the extent the words “direct active” and “regulatory, proscriptive or compulsory” have different meanings, the difference seems inconsequential. Both tests appear to encompass situations in which military personnel perform traditional duties of law enforcement officers, such as making an arrest or searching for evidence.<sup>121</sup>

In summary, the Wounded Knee cases developed three tests for determining what constitutes an execution of the laws in violation of the Posse Comitatus Act. Only one, however, appears to be significantly different from the other two. The “pervasive use” test developed in *Jaramillo* encompasses situations in which military personnel merely influence civilian law enforcement officers in the performance of their duties.<sup>122</sup> The “direct active use” test developed in *Red Feather* and the “regulatory, proscriptive or compulsory use” test developed in *McArthur*, however, do not encompass this type of passive activity.<sup>123</sup> Instead, these tests appear to apply to situations in which military personnel perform traditional duties of law enforcement officers, such as making an arrest or searching for evidence.<sup>124</sup>

Arguably, the *Red Feather* and *McArthur* tests are the proper

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118. *Id.* at 194.

119. *Id.* See *supra* note 110.

120. See *McArthur*, 419 F. Supp. at 194-95 (military involvement did not satisfy “regulatory, proscriptive or compulsory use” test); *Red Feather*, 392 F. Supp. at 925 (passive involvement of military troops not unlawful under Posse Comitatus Act).

121. See *McArthur*, 419 F. Supp. at 194 (“execute” implies an authoritarian act); *Red Feather*, 392 F. Supp. at 925 (execution of laws encompasses activities such as making an arrest or searching for evidence).

122. See *supra* note 91.

123. See *supra* note 120.

124. See *supra* note 121. These tests appear to parallel a congressional limitation placed on the use of military personnel pursuant to the provisions of 10 U.S.C. §§ 373-74 (1982), which authorize limited military cooperation with civilian law enforcement officers. *Id.* This limitation requires the Defense Department to issue regulations necessary to prevent military personnel from participating directly “in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity. . . .” 18 U.S.C. § 375 (1982). They also appear to parallel an explicit exception to the Posse Comitatus Act in 18 U.S.C. § 831 (1982), which prohibits certain transactions involving nuclear materials. *Id.* This exception provides that notwithstanding the Posse Comitatus Act, military personnel may in certain cases “arrest persons and conduct searches and seizures with respect to violations of [section 831].” *Id.*

constructions of the words "execute the laws."<sup>125</sup> These tests allow the military to provide passive aid to civilian authorities without violating the Act.<sup>126</sup> This passive aid may in many cases satisfy the needs of civilian authorities during periods of civil disorder.<sup>127</sup> Hence, there may be no need to have military troops called out pursuant to constitutional or statutory authority.<sup>128</sup> This result is desirable because once military troops are called out pursuant to constitutional or statutory authority the Posse Comitatus Act does not apply and the troops may engage in law enforcement activities without restriction.<sup>129</sup> In contrast, under the "pervasive use" test developed in *Jaramillo*, military troops would have to be called out pursuant to constitutional or statutory authority only; any other commitment would violate the Act.<sup>130</sup> This immediate commitment of troops may be undesirable, and under the *Red Feather* and *McArthur* tests it would be unnecessary in many cases.<sup>131</sup>

### C. NATURE OF THE ASSISTANCE: MILITARY OR CIVILIAN?

Some cases hold that the Posse Comitatus Act is not violated when military personnel assist civilian law enforcement officers on their own initiative as private citizens.<sup>132</sup> The Michigan Supreme Court's opinion in *People v. Burden*<sup>133</sup> illustrates the rationale of these cases.

In *Burden* a member of the United States Air Force participated as an undercover agent in a drug investigation.<sup>134</sup> As a result of this investigation, the state police arrested the defendants.<sup>135</sup> The Air Force base commander approved of the airman's participation in the investigation, and in return for his participation, the civilian authorities dropped criminal charges against him.<sup>136</sup> The defendants filed a motion to exclude the airman's testimony at trial, alleging that the airman's participation

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125. 18 U.S.C. 1385 (1982).

126. See *supra* note 120.

127. Cf. *supra* note 106.

128. *Id.*

129. See *Red Feather*, 392 F. Supp. at 924.

130. See *supra* note 91 and accompanying text.

131. Cf. Note, *supra* note 19, at 730.

132. See *People v. Blend*, 121 Cal. App. 3d 215, 227, 175 Cal. Rptr. 263, 270 (1981) (Wave's participation in investigation leading to arrest of defendant characterized as civilian); *People v. Burden*, 411 Mich. 56, 61, 303 N.W.2d 444, 447 (1981) (per curiam) (airman's participation in investigation leading to arrest of defendant characterized as civilian); cf. *Burns v. State*, 473 S.W.2d 19, 20 (Tex. Crim. App. 1971) (in concluding that Act was not violated, court relied in part on undercover agent's civilian status).

133. 411 Mich. 56, 58, 303 N.W.2d 444, 445 (1981) (per curiam).

134. *Id.*

135. *Id.*

136. *Id.*



in the investigation violated the Posse Comitatus Act.<sup>137</sup> The trial court ordered the exclusion of the testimony and the intermediate appellate court affirmed.<sup>138</sup>

Finding no violation of the Posse Comitatus Act, the Michigan Supreme Court reversed the lower courts.<sup>139</sup> The court stated that “[o]ne must look to the nature of the assistance rendered the civilian authority in each case to determine if the aid may be characterized as military.”<sup>140</sup> In determining that the airman’s participation was civilian in character, the court noted that the airman was not in military uniform, not acting under military orders, and not a regular military law enforcement agent.<sup>141</sup> The court also noted that the airman’s military status did not enhance his usefulness to the civilian authorities.<sup>142</sup>

The court’s holding in *Burden* that the Posse Comitatus Act is not violated when the assistance rendered by military personnel may be characterized as civilian rather than military appears to be consistent with the Act’s language. Activity that is civilian in nature does not satisfy the Act’s requirement that the activity be performed by “any part of the Army or Air Force.”<sup>143</sup> In reaching the conclusion that the airman’s assistance was civilian in nature, the court did not need to address whether there was an execution of the laws under the Act.<sup>144</sup> Moreover, the court did not need to address whether the military had its own purpose in the law enforcement activities performed, an issue considered in another line of cases interpreting the Act.

137. *Id.*

138. *Id.*

139. *Id.* at 61, 303 N.W.2d at 447.

140. *Id.* In reaching the conclusion that violations of the Posse Comitatus Act depend on the nature of the assistance rendered civilian authorities, the court relied on the debates in Congress over passage of the Act. *Id.* at 59-60; 303 N.W.2d at 446. One of the court’s quotations from these debates is as follows:

“If a soldier sees a man assaulting me with a view to take my life, he is not going to stand by and see him do it; he comes to my relief not as a soldier, but as a human being, a man with a soul in his body, and as a citizen.”

*Id.* at 60, 303 N.W.2d at 446 (quoting 7 CONG. REC. 4245 (1878) (remarks of Senator Merrimon)).

141. *Id.* at 61, 303 N.W.2d at 447.

142. *Id.* One commentator has listed factors which may characterize activity as being military in nature:

Some factors . . . include aid given during duty hours, aid prompted or suggested by a military superior or aid given with the knowledge or acquiescence of a military superior. Other considerations include the manner in which the civil authorities contacted the military person, whether that person regularly performs military law enforcement functions, and whether or not the individual’s usefulness to civil authorities is related to his military status.

Meeks, *supra* note 16, at 127.

143. 18 U.S.C. § 1385 (1982).

144. See *supra* text accompanying notes 70-131.

## D. THE MILITARY PURPOSE DOCTRINE

Several cases hold that the Posse Comitatus Act is not violated when a military purpose justifies military involvement in civilian law enforcement.<sup>145</sup> The North Carolina Supreme Court's opinion in *State v. Nelson*<sup>146</sup> exemplifies this line of cases.

In *Nelson* civilian authorities arrested two soldiers.<sup>147</sup> After their arrest, military authorities entered the soldiers' billets pursuant to military regulations requiring that an inventory be taken of a soldier's equipment whenever he has been gone for a certain length of time.<sup>148</sup> Thereafter, the authorities noticed newspaper accounts that described certain stolen items.<sup>149</sup> The descriptions appeared to match some of the items seized from the soldiers' billets.<sup>150</sup> The military authorities turned the items over to civilian authorities who used them in their prosecution of the soldiers.<sup>151</sup> The soldiers were convicted of several charges and appealed.<sup>152</sup>

On appeal the soldiers contended that the items seized from their billets should have been excluded from evidence because they were given to the civilian authorities in violation of the Posse Comitatus Act.<sup>153</sup> Stating that the Act is not violated when the military performs acts primarily for military purposes and only incidentally enhances civilian law enforcement, the North Carolina Supreme Court found no violation of the Act.<sup>154</sup> The court reasoned that the military inventory that led to the surrender of the items was initially conducted for military purposes and only incidentally enhanced the effectiveness of civilian law enforcement.<sup>155</sup>

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145. See, e.g., *Harker v. State*, 663 P.2d 932, 937 (Alaska 1983) (Posse Comitatus Act not violated because military policeman who arrested civilian had a military duty to make the arrest in order to protect persons on base); *State v. Nelson*, 298 N.C. 573, \_\_\_\_, 260 S.E.2d 629, 639 (1979) (Posse Comitatus Act not violated since military inventory that led to the surrender of evidence against the defendants was conducted pursuant to military regulations), *cert. denied*, 446 U.S. 929 (1980); cf. *United States v. Hartly*, 486 F. Supp. 1348, 1356 (M.D. Fla. 1980) (in concluding that Act was not violated, court relied in part on fact that military personnel involved were performing their normal military duties), *aff'd*, 678 F.2d 961 (1982), *cert. denied*, 103 S.Ct. 815, 834 (1983). The military purpose doctrine evolved from the following quotation in a law review article: "[It] is the author's conclusion that . . . those situations where an act performed primarily for the purpose of insuring the accomplishment of the mission of the armed forces incidentally enhances the enforcement of civilian law do not violate the statute." Furman, *supra* note 2, at 128.

146. 298 N.C. 573, 260 S.E.2d 629 (1979), *cert. denied*, 446 U.S. 929 (1980).

147. *State v. Nelson*, 298 N.C. 573, \_\_\_\_, 260 S.E.2d 629, 634 (1979), *cert. denied*, 446 U.S. 929 (1980).

148. *Id.* at \_\_\_\_, 260 S.E.2d at 635.

149. *Id.*

150. *Id.*

151. *Id.* at \_\_\_\_, 260 S.E.2d at 635-36.

152. *Id.* at \_\_\_\_, 260 S.E.2d at 634.

153. *Id.* at \_\_\_\_, 260 S.E.2d at 639.

154. *Id.*

155. *Id.*

Thus, according to *Nelson*, the Posse Comitatus Act is not violated when a military purpose justifies military involvement in civilian law enforcement.<sup>156</sup> In *Nelson* the military involvement justified by a military purpose was activity conducted pursuant to military regulations.<sup>157</sup> Types of military involvement justified by a military purpose in other cases include (1) activities focusing on the illicit drug dealings of an Army officer;<sup>158</sup> (2) the performance of military duties relating to the removal of military personnel from situations potentially involving the breach of civilian laws;<sup>159</sup> and (3) the protection of persons on base from "fleeing armed felons."<sup>160</sup>

Note that by reaching the conclusion that the military involvement in *Nelson* was justified by a military purpose, the court did not need to address whether there was an execution of the laws.<sup>161</sup> Further, the court did not need to address whether the involvement was civilian or military in nature.<sup>162</sup>

#### E. A POSSIBLE APPROACH FOR DETERMINING WHETHER THE POSSE COMITATUS ACT IS VIOLATED

An analysis of the cases interpreting the Posse Comitatus Act reveals that although the cases appear inconsistent, most can be reconciled. This analysis results in the following criteria for determining when the Act is violated:

156. *Id.* at \_\_\_\_, 260 S.E.2d at 639.

157. *See id.* at \_\_\_\_, 260 S.E.2d at 639.

158. *See State v. Trueblood*, 46 N.C. App. 541, \_\_\_\_, 265 S.E.2d 662, 664 (1980). In *Trueblood* a military investigator accompanied a civilian law enforcement official during an investigation of the defendant, an Army officer. *Id.* at \_\_\_\_, 265 S.E.2d at 663. The civilian law enforcement official arrested the defendant after he sold drugs to a civilian undercover agent. *Id.* at \_\_\_\_, 265 S.E.2d at 664. The defendant contended that the military investigator's participation in the investigation violated the Posse Comitatus Act and that all the evidence obtained as a result of the violation should have been excluded at his trial. *Id.* at \_\_\_\_, 265 S.E.2d at 663. The court found no violation of the Act, reasoning that the defendant Army officer's drug dealings were of direct concern to the military investigator in the performance of his duties. *Id.* at \_\_\_\_, 265 S.E.2d at 664.

159. *See State v. Sanders*, 303 N.C. 657, \_\_\_\_, 281 S.E.2d 7, 10, *cert. denied*, 454 U.S. 973 (1981). In *Sanders* two military policemen assisted a civilian policeman in making an unlawful arrest of the defendant soldier. *Id.* at \_\_\_\_, 281 S.E.2d at 8. Thereafter, the defendant killed a third military policeman who was attempting to take him back to base. *Id.* at \_\_\_\_, 281 S.E.2d at 9. The defendant admitted the killing in a written statement, but later argued that suppression of the statement was required because it had been obtained as a result of a violation of the Posse Comitatus Act. *Id.* at \_\_\_\_, 281 S.E.2d at 9-10. Reasoning that the military policemen were performing their military duties in attempting to remove the defendant soldier from a situation potentially involving the breach of civilian laws, the court held there was no violation of the Posse Comitatus Act. *Id.* at \_\_\_\_, 281 S.E.2d at 10.

160. *See Harker v. State*, 663 P.2d 932, 937 (Alaska 1983). In *Harker* a military policeman stopped a suspected get-away car on a military base, arrested the defendant, and searched and seized evidence from the car. *Id.* at 933. The defendant argued that the military policeman's activity violated the Posse Comitatus Act and that the evidence taken as a result of the violation should have been excluded at his trial. *Id.* Reasoning in part that the military policeman had a military duty to protect persons on base from "fleeing armed felons," the court concluded that the Posse Comitatus Act was not violated. *Id.* at 937.

161. *See supra* text accompanying notes 70-131.

162. *See supra* text accompanying notes 132-144.

First, the activity must be performed "willfully."<sup>163</sup> Although the Act specifically imposes this requirement, courts have virtually ignored it.<sup>164</sup>

Second, the activity must be an execution of the laws.<sup>165</sup> Arguably, the "direct active use" test developed in *Red Feather* and the "regulatory proscriptive or compulsory use" test developed in *McArthur* are the proper constructions of the words "execute the laws."<sup>166</sup> These tests appear to encompass situations in which military personnel perform traditional duties of law enforcement officers rather than situations in which they provide only passive assistance to civilian authorities.<sup>167</sup>

Third, the activity must be performed by "any part of the Army or Air Force."<sup>168</sup> Apparently this requirement means that military personnel must perform the activity and that they must not be acting on their own initiative as private citizens.<sup>169</sup> The use of military supplies and equipment does not appear to fall under this requirement.<sup>170</sup>

Finally, the activity must not fall under the military purpose doctrine.<sup>171</sup> Under this doctrine acts performed primarily for military purposes that only incidentally enhance civilian law enforcement do not violate the Posse Comitatus Act.<sup>172</sup>

Admittedly, the preceding criteria do not set forth a clear-cut test for determining whether activity violates the Posse Comitatus Act. All of the criteria await further development by the courts on a case-by-case basis. Nevertheless, these criteria represent a synthesis

163. 18 U.S.C. § 1385 (1982). The word "willfully" in a criminal statute usually means "an act done with a bad purpose . . . , without justifiable excuse . . . ; [or] stubbornly, obstinately, [and] perversely . . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act . . . ." *United States v. Murdock*, 290 U.S. 389, 394-95 (1933).

164. *But see* *Harker v. State*, 663 P.2d 932 (Alaska 1983). In *Harker* the court construed "willfully" as requiring that civilian authorities request military assistance and as not encompassing situations in which the military volunteers assistance. *Id.* at 937. Arguably, this construction is wrong. The word "willfully" appears to implement a culpability requirement. *See* 18 U.S.C. § 1385 (1982).

165. *See supra* text accompanying notes 70-131.

166. 18 U.S.C. § 1385 (1982); *see supra* text accompanying notes 125-131.

167. *See supra* note 121 and accompanying text. *Compare, e.g.*, *United States v. Walden*, 490 F.2d 372, 373, 376 (4th Cir.) (military personnel acted as undercover agents investigating crime, thus violating Navy regulation substantially similar to Posse Comitatus Act), *cert. denied*, 416 U.S. 983 (1974) and *State v. Danko*, 219 Kan. 490, 491, 493, 548 P.2d 819, 820, 822 (1976) (trial court found violation of Act when military personnel participated in search of car) *with* *Burns v. State*, 473 S.W.2d 19, 20 (Tex. Crim. App. 1971) (no violation of Act because execution of laws did not occur when military police accompanied civilian authorities to place of arrest).

168. 18 U.S.C. § 1835; *see supra* text accompanying notes 132-144.

169. *See, e.g.*, *People v. Burden*, 411 Mich. 56, 61, 303 N.W.2d 444, 447 (1981) (*per curiam*).

170. *See, e.g.*, *United States v. Jaramillo*, 380 F. Supp. 1375, 1379 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

171. *See supra* text accompanying notes 145-162.

172. *See, e.g.*, *State v. Nelson*, 298 N.C. 573, \_\_\_\_\_, 260 S.E.2d 629, 639 (1979), *cert. denied*, 446 U.S. 929 (1980).

of most of the cases interpreting the Act and provide an outline for those faced with the task of applying the Act to a factual situation.

#### F. THE EXCLUSION OF EVIDENCE BASED UPON A VIOLATION OF THE ACT

The common law rule is that illegally obtained evidence is not excluded from evidence at trial.<sup>173</sup> Evidence obtained in violation of a criminal defendant's constitutional rights constitutes an exception to this rule.<sup>174</sup> Also, courts sometimes exclude evidence obtained in violation of statutes or rules.<sup>175</sup>

In *United States v. Walden*<sup>176</sup> the Fourth Circuit Court of Appeals considered whether the violation of a Navy regulation<sup>177</sup> implementing the policy of the Posse Comitatus Act required the exclusion of evidence obtained as a result of that violation.<sup>178</sup> In *Walden* three marines worked as undercover investigators at the request of a Special Investigator of the United States Treasury Department.<sup>179</sup> In the course of their mission the marines purchased firearms from the defendants who were selling them in violation of federal firearms statutes.<sup>180</sup> The defendants were convicted of violating those statutes and appealed.<sup>181</sup>

On appeal the defendants contended that the Marine's investigation violated the Navy regulation and the Posse Comitatus Act of 1878 and that the trial court erred in failing to exclude the fruits of that investigation.<sup>182</sup> The court of appeals held that the investigation violated the Navy regulation and the spirit of the Act, but declined to apply an exclusionary rule.<sup>183</sup> In making this determination, the court emphasized that violations of the Posse Comitatus Act and its policy were not widespread.<sup>184</sup> The court also stated that there was no evidence that the violation was

173. See 8 J. WIGMORE, EVIDENCE § 2183, at 7 (McNaughton rev. 1961) (discussion of admissibility of illegally obtained evidence).

174. See, e.g., *Weeks v. United States*, 232 U.S. 383, 398 (1914) (exclusionary rule for violations of fourth amendment mandated in federal courts); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (exclusionary rule for violations of fourth amendment mandated in state courts as well). See generally C. WHITEBREAD, CRIMINAL PROCEDURE § 2.01-04 (1980) (discussion of exclusionary evidence rule for constitutional violations).

175. See, e.g., *McNabb v. United States*, 318 U.S. 332, 341-42 (1943) (violation of predecessor of Rule 5(a) of the Federal Rules of Criminal Procedure required exclusion of evidence in federal courts); *State v. Anderson*, 336 N.W.2d 634, 638-40 (N.D. 1983) (exclusion of evidence based on policeman's violation of implied consent statute).

176. 490 F.2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974).

177. See *supra* note 58.

178. *United States v. Walden*, 490 F.2d 372, 376-77 (4th Cir.), cert. denied, 416 U.S. 983 (1974).

179. 490 F.2d at 373.

180. *Id.*

181. *Id.* at 372-73.

182. *Id.* at 373.

183. *Id.* at 373-77. See *supra* text accompanying notes 56-59.

intentional and that the policy expressed in the Act was for the benefit of the nation as a whole, and not designed to protect individuals' personal rights.<sup>185</sup> Moreover, the court expressed confidence that the military would take steps to prevent violations of the Act, noting that a major reason for excluding evidence as a result of fourth amendment violations is that alternative remedies have proved ineffective.<sup>186</sup> The court concluded: "Should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider whether adoption of an exclusionary rule is required as a future deterrent."<sup>187</sup>

Thus, the *Walden* court concluded that application of an exclusionary rule is not presently necessary for violations of the Posse Comitatus Act.<sup>188</sup> The court warned, however, that it would consider application of an exclusionary rule in the future if violations of the Act become frequent and widespread.<sup>189</sup>

The Oklahoma Court of Criminal Appeals did not wait for frequent and widespread violations of the Act, but held that application of an exclusionary rule was appropriate in *Taylor v. State*.<sup>190</sup> In *Taylor* a military policeman requested the assistance of the local police department in his investigation of an off-base source of drugs.<sup>191</sup> The local police arrested the defendant after the military policeman made an undercover drug purchase from him.<sup>192</sup> During the arrest the military policeman pulled a gun, and after the arrest he participated in the search of the defendant's house.<sup>193</sup> The military policeman also delivered the drugs to the civilian authorities and filled out the submittal forms.<sup>194</sup> The

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184. 490 F.2d at 377. The court in *Walden* stated as follows:

[I]mportant . . . is the fact that this case is the first instance to our knowledge in which military personnel have been used as the principal investigators of civilian crimes in violation of the [regulation]. We are not aware from the reported decisions of other courts that there has been any other violation, let alone widespread or repeated violations.

*Id.* (footnote omitted).

185. *Id.* at 376-77.

186. *Id.*

187. *Id.* at 377. *Accord* United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979) (no exclusionary rule applied, but left the matter open in case of widespread and repeated violations of the Act); State v. Danko, 219 Kan. 490, 497-98, 548 P.2d 819, 825 (1976) (court followed *Walden* and declined to apply an exclusionary rule).

188. 490 F.2d at 377.

189. *Id.*

190. 645 P.2d 522, 525 (Okla. Crim. App. 1982).

191. Taylor v. State, 645 P.2d 522, 523 (Okla. Crim. App. 1982).

192. *Id.*

193. *Id.* at 525.

194. *Id.*

defendant was convicted of a drug offense and appealed.<sup>195</sup>

On appeal the defendant contended that all the evidence garnered pursuant to his arrest should have been excluded at trial because the arrest was made in violation of the Posse Comitatus Act.<sup>196</sup> The court stated that a violation of the Act does not automatically require the application of an exclusionary rule, but held that under the facts of the case the trial court erred in failing to exclude the evidence.<sup>197</sup> The court noted that the military policeman's involvement in the law enforcement activities was excessive and "intolerably surpassed" that which was present in three earlier Oklahoma cases in which no violation of the Act was found.<sup>198</sup>

Thus, according to *Taylor*, the application of an exclusionary rule based upon a violation of the Posse Comitatus Act is not automatic, but depends on the flagrancy of the violation.<sup>199</sup> *Taylor* is a troublesome decision. In reaching its conclusion that the evidence should have been excluded, the *Taylor* court did not specifically state that the Act had been violated. This "oversight" may exemplify a problem with the court's rationale in that it is difficult enough to determine what constitutes a violation of the Act,<sup>200</sup> let alone a flagrant violation.

In summary, there are two rationales with respect to the application of an exclusionary rule for violations of the Posse Comitatus Act. Under the *Walden* rationale, application of an exclusionary rule will not be considered until violations of the Act become frequent and widespread.<sup>201</sup> Under the *Taylor* rationale, an exclusionary rule will be applied only when the Act is flagrantly violated.<sup>202</sup>

195. *Id.* at 523.

196. *Id.*

197. *Id.* at 524-25.

198. *Id.* See *Lee v. State*, 513 P.2d 125, 126 (Okla. Crim. App. 1973) (no violation of Act because military investigator did nothing more than act as a private citizen when he made an undercover purchase without arresting defendant or asserting military authority over him), *cert. denied*, 415 U.S. 932 (1974); *Hildebrandt v. State*, 507 P.2d 1323, 1325 (Okla. Crim. App. 1973) (no violation of Act because military investigators made undercover purchase outside scope of military jurisdiction where they assumed no greater authority than that of private citizens); *Hubert v. State*, 504 P.2d 1245, 1246-47 (Okla. Crim. App. 1972) (no violation of Act because military investigators made undercover purchase outside scope of military jurisdiction where they assumed no greater authority than that of private citizens). The conclusion of these cases that the military investigators were acting as private citizens outside their jurisdiction has been criticized as follows: "The decisions fail to justify that conclusion and the facts simply do not support it. Rather than acting as private citizens, the [military investigators] were engaging in their primary military occupation as criminal investigators. . . ." Meeks, *supra* note 16, at 113.

199. See *Taylor*, 645 P.2d at 524.

200. See *United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979). The court in *Wolffs* characterized the issue of what constitutes a violation of the Posse Comitatus Act as "complex and difficult." *Id.*

201. See *Walden*, 490 F.2d at 377. See *supra* text accompanying notes 176-189.

202. See *Taylor*, 645 P.2d at 525. See *supra* text accompanying notes 190-199.

Arguably, the exclusion of evidence is not a proper remedy for a violation of the Posse Comitatus Act. Two reasons support this argument. First, the Act does not provide for the exclusion of evidence when the Act is violated.<sup>203</sup> Thus, there is no legal requirement necessitating the exclusion of evidence when the Act is violated. Second, the Act contains its own remedy — criminal prosecution.<sup>204</sup> Although the possibility of a prosecution for a violation of the Act appears slight,<sup>205</sup> it still exists. There is no evidence that Congress intended the Posse Comitatus Act to double as an exclusionary rule.

One may argue that the exclusion of evidence based upon a violation of the Act is necessary to prevent the impairment of judicial integrity that results when tainted evidence is admitted at trial.<sup>206</sup> The counterargument to this proposition is that “there [is no] evidence that the community disapproves more of convicting a lawbreaker on tainted evidence than of letting the lawbreaker loose to prey again.”<sup>207</sup> More than fifty years ago, Judge, later Justice, Cardozo observed that when an exclusionary rule is applied “[t]he criminal is to go free because the constable has blundered.”<sup>208</sup> A rewording of this observation shows its relevance to those situations in which evidence is sought to be excluded because of a violation of the Posse Comitatus Act: Is the criminal to go free because the soldier has blundered?

#### IV. CONCLUSION

Congress enacted the Posse Comitatus Act during the Civil War reconstruction period to put an end to military involvement in civilian law enforcement.<sup>209</sup> Although the Act sets forth a criminal offense, criminal defendants have attempted to use it as an exclusionary rule.<sup>210</sup>

The cases interpreting the Posse Comitatus Act appear discordant at first glance. Most of these cases can be reconciled, however, to form criteria for determining when the Act is

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203. See 18 U.S.C. § 1385 (1982).

204. See *id.* (provides for payment of fine up to \$10,000, imprisonment up to two years, or both).

205. See *supra* note 9 and accompanying text.

206. See C. WHITEBREAD, CRIMINAL PROCEDURE § 2.01 (1980) (discussion of rationales for exclusionary evidence rule for constitutional violations).

207. 8 J. WIGMORE, EVIDENCE § 2184(a), at 52 (McNaughton rev. 1961).

208. *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (court rejected the federal exclusionary rule for violations of the fourth amendment in pre-*Mapp* era).

209. See *supra* text accompanying notes 11-42.

210. See, e.g., *Walden*, 490 F.2d at 373; *Taylor*, 645 P.2d at 523.



violated.<sup>211</sup> These criteria are as follows: (1) the activity must be willful; (2) the activity must involve the performance of duties traditionally associated with law enforcement officers; (3) the activity must be performed by military personnel who are not acting on their own initiative as private citizens; and (4) the activity must not be justified by a military purpose.<sup>212</sup>

There are two rationales with respect to the application of an exclusionary rule for violations of the Posse Comitatus Act.<sup>213</sup> Under the *Walden* rationale application of an exclusionary rule will not be considered until violations of the Act become frequent and widespread.<sup>214</sup> Under the *Taylor* rationale an exclusionary rule will be applied only when the Act is flagrantly violated.<sup>215</sup> The exclusion of evidence does not appear to be a proper remedy for a violation of the Act for two reasons.<sup>216</sup> First, the Act does not provide for the exclusion of evidence.<sup>217</sup> Second, the Act contains its own remedy — criminal prosecution.<sup>218</sup>

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211. See *supra* text accompanying notes 163-172.

212. *Id.*

213. See *supra* text accompanying notes 173-202.

214. See *Walden*, 490 F.2d at 377. See *supra* text accompanying notes 176-189.

215. See *Taylor*, 645 P.2d at 524-25. See *supra* text accompanying notes 190-199.

216. See *supra* text accompanying notes 203-205.

217. See *supra* note 203.

218. See *supra* note 204.