U.S. DEP'T OF ARMY PAMPHLET 27-100-161

MILITARY LAW REVIEW

VOLUME 161 • 1999

Volume 161 September 1999

MILITARY LAW REVIEW

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MILITARY LAW REVIEW

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OPENING THE GATE?: AN ANALYSIS OF MILITARY LAW ENFORCEMENT AUTHORITY OVER CIVILIAN LAWBREAKERS ON AND OFF THE FEDERAL INSTALLATION

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Fort Swampy is a large Army installation with exclusive federal jurisdiction. At 2200 one night, military policewoman Sergeant Lisa Smith is driving a police vehicle on traffic patrol when she receives an order to pick up a shoplifter detained at the post exchange by a store detective. Upon arrival, she is shocked to see a man run from the store, grab a woman standing at the gas pumps, violently push the woman into her car, jump into the car with the wontan, and speed away. Sergeant Smith pursues the vehicle for two miles at high speeds toward an exit gate that is only open during daytime. Finding the gate closed, the man exits the car, climbs over the gate fence, and runs away. Sergeant Smith quickly ensures the woman is safe, then climbs the fence, draws her 9mm handgun, and pursues the man on foot, chasing him into a crowded trailer park. The man is exhausted, so she gains on him. At thirty feet, he suddenly turns in the darkness, it appears he has a gun. Sergeant Smith fires– bamm, bamm!! The shots miss, but the man hits the ground and gives up. As reinforcements arrive, Sergeant Smith handcuffs

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the man and instructs another military police officer (MP to transport him to the MP station.

I. Introduction

Sergeant Smith has saved the day, apprehending a dangerous felon. But what exactly are the limits of her authority? Can she legally exercise her military law enforcement authority outside the gates?

This article examines the authority that military law enforcement officials[2] may exercise over civilian lawbreakers. Specifically, the article seeks to clarify the legal bases for the assertion of military police power over civilians in various contexts–both on and off the federal military installation.[3] The focus is on the exertion of authority at the *initiative* of

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2. Military law enforcement officials include both military service members assigned to such duties and civilians hired by the military departments to perform law enforcement duties. ***See*** MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 302(b)(1) (1998) [hereinafter MCM] (defining military law enforcement officials as "security police, military police, master at arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the code or not . . ."). Civilians contracted by or hired by the military departments as guards or police have the same basic law enforcement authority, including the power to apprehend persons subject to the code, as active duty military law enforcement. ***See*** MCM, ***supra,*** R.C.M. 302 analysis, app. 21, at A21-13; ***see also*** Police Powers: Contract Guards Have Same Authority as Security Police, Op. JAG, Air Force, No. 65 (10 July 1980) (opining that civilian contract guards, as agents of the installation commander, have the same law enforcement authority, including the use of force, as military security police); Civilian Police/Guard Authority and Liability, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1979/3255, para. 1.b. (14 Sept. 1979) (opining that Army civilian law enforcement personnel and guards, through the authority of the installation commander, may apprehend and detain civilians for offenses committed on the installation); Telephone Interview with John J. Penyman, III, Special Agent, Office of the Inspector General, Department of Defense, Criminal and Investigative Police and Oversight Division (Jan. 19, 1999) (stating that, under Department of Defense policy, civilian law enforcement officials derive the same authority from the commander as service members performing law enforcement duties).

3. The scope of this article is limited to the authority of military law enforcement authorities within the continental United States. The authority of these officials overseas will vary between countries and will likely differ from their authority within the continental United States. The law of the host nation may affect their authority over both service members and, in particular, civilians. An international agreement–such as a status of forces agreement–may provide guidelines for the execution of military law enforcement duties. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-30, MILITARY POLICE INVESTIGATIONS, para. 4-2 (1 June 1978) [hereinafter AR 190-30] ("In overseas areas, off-post incidents will be investigated in accordance with Status of Forces Agreements and/or other appropriate United States-host country agreements.").

military officials, and not at the request of, or in cooperation with, civil authorities.[4]

The primary focus of this article is to study the power of military officials to conduct warrantless *arrests* of civilians.[5] The decision to arrest is a critical stage in the assertion of police authority, and is perhaps the most intrusive of all governmental powers. An illegal arrest may violate the Fourth Amendment's guarantee to be free from unreasonable seizures;[6] evidence seized incident to (weapons, contraband) or resulting from (confessions, identifications) an illegal arrest will be suppressed by courts as "fruit of the poisonous tree."[7] In particularly egregious cases, an illegal arrest may warrant a civil tort action.[8] The authority to arrest is thus an extraordinary power, the abuse of which raises grave concerns. Accordingly, this article provides military law enforcement officials and the attorneys who advise them with clear guidelines on the authority to arrest a civilian.

Section II reviews the legal limitations to military authority over civilians, including the lack of federal statutory arrest authority, and the specific limitation of the Posse Comitatus Act,[9] which generally prohibits military assistance to civil authorities in enforcing civil laws." Section III reviews the principle legal basis for the assertion of military law enforcement authority over civilians: the inherent authority and responsibility of the installation commander to maintain law and order and protect the inhabitants of the installation." Section III also reviews the principle exception to the Posse Comitatus Act allowing for this exercise of military police power: the Military Purpose Doctrine, which permits actions taken for the primary purpose of furthering a military function, regardless of the incidental benefits to civil authorities. This article analyzes the Military Purpose Doctrine in the context of both on- and off-post applications of authority.

Finally, Section IV studies two likely off-post scenarios where military law enforcement officials will need to make instantaneous decisions

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4. This article concerns only those cases in which military law enforcement officials take the initiative to assert their authority over civilians. For example, a military policeman observes a civilian driving while intoxicated, and on his own initiative, he pursues the civilian and detains him. This article does not address those circumstances in which *civilian authorities request assistance* to enforce civil laws–such as to quell a riot. There are various federal statutes that authorize military assistance to civil authorities when requested. **See** *infra* Section II.B for a listing of various exceptions to the Posse Comitatus Act allowing military support in response to specific requests for assistance.

about the extent of their authority: (1) a civilian lawbreaker. being followed in "hot pursuit," crosses *outside* the boundary of federal jurisdiction; and (2) a military official, within a close response range, personally

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5. The term "arrest" in this article is the commonly used, conventional civilian term developed in the common law. Through a series of Fourth Amendment cases, the United States Supreme Court has attempted to define arrest. ***See,*** e.g., Florida v. Royer, 460 U.S. 491 (1983). In its basic form, "arrest occurs when a person's liberty has been restricted by law enforcement officers to the extent that he is not free to leave at his own volition." CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 3.02. (1986). Not all restrictions of one's freedom of movement will rise to an arrest; it depends on the totality of the circumstances. *See* ***id.***

It is important at this point in the article to clarify that the conventional civilian term "arrest" will be used because the common law of arrest applies when civilians are detained by military law enforcement authorities and eventually prosecuted in civilian state or federal courts. For military justice practitioners, there is often confusion in the use of such terms as "apprehension" and "arrest." The military term "apprehension" is the equivalent of "arrest" in civilian terminology. MCM, *supra* note 2. R.C.M. 302 discussion; *see also* ***id.*** R.C.M. 302 analysis, app. 21, at A2 1-13 ("The peculiar military term "apprehension" is statutory (Article 7(a)) and cannot be abandoned in favor of the more conventional civilian term, "arrest."). The characteristics of the military term "apprehension" are the same as the civilian term "arrest." In the context of military justice, an "apprehension" may be performed by law enforcement or certain non-law enforcement personnel. The apprehension must be based on probable cause, and the custody–the exercise of government control over the person's freedom of movement–may continue until proper authorities are notified and pretrial restraint or confinement is ordered. *Id.* R.C.M. 302 discussion. As with the civilian "arrest," a lawful apprehension justifies an extensive search "incident to the apprehension." *Id.*

Some military legal advisors add to the confusion with the term "detention." Because military law enforcement officials do not have statutory arrest power over civilians, *see infra* Section II.A, these advisors are careful to avoid the assertion that military officials may "arrest" civilians. For example, the Air Force Judge Advocate General states that Air Force security police may not "apprehend (in the sense of making an arrest) a civilian . . . who commits a state crime on an Air Force installation." Military Detention of Civilians for Certain Offenses Committed Within an Air Force Installation, Op. JAG, Air Force, No. 60 (3 Oct. 1991). The Air Force then states that military authorities may "*detain* civilians for alleged violations of law on the installation if they have probable cause." *Id.* (emphasis added). Such civilians may be detained for a "reasonable period of time to carry out administrative action or until appropriate civil officials arrive, . . . or until they can be delivered into the custody of the appropriate civilian authority." *Id.* The Air Force chooses the term "detention" to avoid the appearance of claiming a right to conduct arrests. But the actions described are nonetheless within the meaning of "arrest" in Fourth Amendment terms: based on "probable cause," detained for a "reasonable period," held until "delivered to civil authorities," etc. Furthermore, the term "detention" is actually intended to be a far less intrusive exertion of authority than the Air Force describes. Generally, detention may be made on less than probable cause, and involves merely a short period of custody, long enough to determine if criminal activity has occurred. MCM, *supra note* 2, R.C.M. 302 discussion.

This article seeks to clarify some of the confusion. Sections III & IV demonstrate how military law enforcement officials, despite not having specific statutory authority, may in fact conduct "arrests" of civilians pursuant to other legal theories developed in the common law. The reader must recognize, however, that for purposes of this article, the term "arrest" is the general term defined through Fourth Amendment case law, and essentially means the deprivation of a suspect's liberty to the extent that the suspect is not free to leave at his own volition.

observes–or is requested to respond to–a crime in progress *off* the installation.[12] In determining the legal bases for military officials to exert authority in these scenarios, Section IV reviews not only the commander's inherent authority and the Military Purpose Doctrine, but other theories as well, including "citizen's arrest" authority and the common law doctrine of extraterritorial authority to arrest when in "hot pursuit."

II. Limiting the Role of the Military in Civil Law Enforcement

A firmly rooted constitutional principle of American government is that the federal armed forces shall be subordinate to civil authorities.[13] Perhaps nowhere is this principle more sacred than in the context of law enforcement, where there exists an historic tradition of strictly limiting direct military involvement in civilian law enforcement activities.[14]

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6. Arrests are analyzed under the Fourth Amendment of the U.S. Constitution, which provides that "[t]he right of the people to be secure in their persons. houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV.

7. WHITEBREAD & SLOBOGIN, *supra* note 5, § 3.01.

8. *Id.*

9. 18 U.S.C.A. § 1385 (West 1998).

10. *See infra* Section II.

11. *See infra* Section III.

12. ***See*** *infra* Section IV.

13. *See* US. CONST. art I. § 8. cl. 11-12 (establishing Congressional powers over military); *id.* art II, $ 2, cl. 1 (establishing Presidential powers as Commander-in-Chief); 9 Op. Att'y Gen. 516, 522 (1860) ("[M]ilitary power must be kept in strict subordination to the civil authority, since it is only in aid of the latter that the former can act at all."); ***see*** *generally* ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, US. ARMY, JA-221. LAW OF MILITARY INSTALLATIONS DESKBOOK. para. 3-1 (Sept. 1996) [hereinafter JA-221] (describing the constitutional and historical tradition of restricting the military's role in civilian law enforcement).

14. ***See*** Brian L. Porto. Annotation, *Construction* ***arid*** *Application of Posse Comitatus Act, arid Similar Predecessor Provisions, Restricting Use of United States Army arid Air Force to Execute* ***Laws,*** 141 A.L.R. FED. **271** (1997) (discussing historical tradition of limiting military involvement in civil law enforcement. and stating that the underlying objective has been the "recognition of the danger inherent in using military personnel to enforce civil law. namely, that military personnel are trained to act in circumstances in which defeat of the enemy, not protection of constitutional freedoms. is their paramount concern"); *see also* U.S. DEP'T OF DEFENSE. DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. **4** (15 Jan. 1986) [hereinafter DOD DIR. 5525.51 (recognizing historic tradition of limiting military involvement in civil law enforcement).

While there have been, and will continue to be, instances when military authorities are lawfully employed to assist civil authorities,[15] the primary responsibility for maintaining law and order in the civilian community is vested in state and local governments.[16] There are, of course, certain federal agencies–but not the Department of Defense–that are granted statutory law enforcement authority over civilians who violate federal penal statutes."

This section reviews the two primary limitations on the exercise of military law enforcement authority over civilians: (1) the lack of congressionally granted statutory authority to arrest; and *(2)* the Posse Comitatus Act. The first limitation reflects Congress's determination that the military has no active role in civil law enforcement. As this article demonstrates, however, the military inevitably must assert some law enforcement authority over civilians–as a minimum, military commanders have the inherent authority *and duty* to maintain law and order on military installations and to guarantee the security of the occupants thereon. The second limitation, therefore, is an affirmative effort by Congress–via a criminal prohibition–to ensure that, beyond these limited authorized uses, the military is never deliberatety used as an active police power over the civilian populace.

A. No Statutory Authority for Military Law Enforcement Officials to Arrest Civilians

The military lacks statutory formal arrest authority over civilians. "Formal arrest" means the authority to take a lawbreaker into physical custody for the purpose of exercising criminal jurisdiction over him.[18] For federal officials, the authority to conduct a formal arrest requires an affirmative statutory grant of power by Congress.[19] Arrests that are conducted

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15. ***See*** Porto. *supra* note 14, at 280-87 (reviewing circumstances when military forces have been employed to enforce civil laws in the past, and describing exceptions to the Posse Comitatus Act that permit their employment today).

16. For the Department of Defense's acknowledgment of this principle, ***see*** U S. DEP'T OF DEFENSE. DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES. para. D.1.c (4 Feb. 1994);***see generally*** JA-221, ***supra*** note 13, para. 3-1.

17. Some federal agencies have broad statutory powers to enforce federal law and arrest persons for violations. Federal Bureau of Investigation agents. 18 U.S.C.A.§ 3052 (West 1998). United States Marshals, 18 U.S.C.A. § 3053. and Secret Service agents. 18 U.S.C.A.§ 3056. may arrest persons for any federal offenses committed in their presence and for "any felony cognizable under the laws of the United States" if based on probable cause. *Id.* This authority extends over state temtories as well as federal territories.

without such authority are unlawful and invalid, unless they are upheld under common law doctrines or other authority.[20]

Several federal agencies, such as the Federal Bureau of Investigation,[21] the U.S. Marshals,[22] and the Secret Service,[23] have broad statutory authority to arrest persons for violations of federal law.[24] Military law enforcement authorities, however, do not possess statutory arrest authority over civilians.[25]

Congress has specifically granted to military law enforcement officials statutory arrest authority over service members for violations of the Uniform Code of Military Justice.[26] This authority applies worldwide.[27] But, while the grant of authority does not *prohibit civilian arrests*, it does not specifically provide for such powers.[28]

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18. As an example, law enforcement agents of the United States Forest Service have "authority to make arrests for the violation of the laws and regulations relating to the national forests, and any person so arrested shall be taken before the nearest United States Magistrate, within whose jurisdiction the forest is located, for trial." 16 U.S.C.A. § 559 (West 1998).

19. United States v. Moderacki, 280 F. Supp. 633, 637 (D. Del. 1968) ("The validity of an arrest by a federal official is tested by federal statutory laws.").

20. Bissonette v. Haig, 800 F.2d 812, 816 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988). When an arrest is held unlawful, evidence seized incident to the arrest may be suppressed under the exclusionary rule. *Id.*; *Moderacki*, 280 F. Supp. at 639.

21. 18 U.S.C.A. $3052.

22. *Id.* § 3053.

23. *Id.* § 3056.

24. These federal agencies have broad statutory powers to arrest persons for violations of federal law. Officials may apprehend persons for any federal offense committed in their presence and for "any felony cognizable under the laws of the United States" if based on probable cause. *Id.* §§ 3052, 3053, 3056. This authority extends over state territories as well as federal territories.

25. See UCMJ art. 7(b) (West 1998) (limiting grant of authority to arrest to "persons subject **to"** the UCMJ); **see** *also* Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412, para. 2 (3 Aug. 1984)("[M]ilitary police have not been given express statutory authority by Congress to arrest civilian lawbreakers at military installations.''). Not all federal agencies are determined to have a "need' for formal arrest authority. The United States Attorney General has established guidelines for analyzing legislative proposals to expand federal agency criminal law enforcement authority. These guidelines list various factors that Congress and agencies must consider. Memorandum from the Attorney General of the United States to the Heads of Executive Departments and Agencies, subject: Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority (June 29, 1984) (on file with author).

Because they lack statutory formal arrest powers over civilians, military law enforcement officials must rely on other bases of legal authority to arrest civilian lawbreakers. Determining these "other bases of legal authority" is the crux of this article. As will be revealed. under such generally accepted common law bases as the installation commander's inherent authority to maintain law and order and protect the installation, the doctrine of extraterritorial authority to arrest when in "hot pursuit." and "citizen's arrest" authority, military law enforcement officials do in fact possess arrest authority in many circumstances. These bases will be explored in Sections III and IV.

B. The Posse Comitatus Act

As stated above, the lack of statutory authority requires military law enforcement officials to rely on other legal bases to assert police power over civilians. But even where the common law permits the military to act, an additional hurdle must always be crossed: the Posse Comitatus Act. The Posse Comitatus Act is the primary restriction on the use of military personnel in civilian law enforcement activities. The Act prohibits using military personnel" to execute civil laws unless authorized by the Constitution or an Act of Congress:

> 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.[30]

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26. UCMJ art. 7(b) (granting apprehension authority–the military term for "arrest"–to any person "authorized under regulations governing the armed forces to apprehend persons subject to" the UCMJ when based on probable cause). As an example of an implementing regulation, ***see*** U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES, para. 3-21 (30 Oct. 1985) [hereinafter AR 195-2] ("[S]pecial agents are authorized to apprehend any person subject to the UCMJ, regardless of location. if there is probable cause to believe that person has committed a criminal offense.").

27. UCMJ art. 5.

28. In *United States v.* ***Moderacki,*** the Delaware District Court reviewed the statute defining the powers of postal inspectors. 39 U.S.C. § 3523, and found that it neither authorized nor proscribed arrests without a warrant. 280 F. Supp. 633, 637 (D. Del. 1968). The court held that "where there is no ***affirmative*** statutory power to arrest without **a** warrant, Congress has not granted the power." *Id.* (emphasis added).

In 1981, Congress enacted legislation to help clarify the types of support military forces may provide to civil law enforcement agencies without violating the Act.[31] The fundamental limitation described by this legislation is that military members[32] may not "directly participate" in civil law enforcement operations.[33] Direct participation includes search and seizure, arrest, and other similar activities.[34] The Department of Defense has implemented this legislation with *Department of Defense Directive*

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29. While the Posse Comitatus Act specifically refers only to the Army and Air Force, its restrictions apply to the Navy and Marines as well. Through legislation enacted in 1981, Congress instructed the Secretary of Defense to prescribe regulations to ensure that all services, including the Navy and Marines, do not directly participate in civilian law enforcement activities, except where authorized by law. 10 U.S.C.A. $ 375 (West 1998). The implementing DOD Directive, which defines those activities that violate the Posse Comitatus Act, pertains to all military departments. *See* DOD DIR. *5525.5, supra* note 14, para. 2.1. The Navy has implemented the DOD Directive with Secretary of the Navy Instruction 5820.7B, which states that "although the use of the Navy and Marine Corps as a posse comitatus is not criminal under the Posse Comitatus Act, such use is prohibited . . . as a matter of Department of Defense policy." U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. 9 (28 Mar. 1998) [hereinafter SECNAVINSTR. 5820.7B]. In *United Stares v. Walden*, the Fourth Circuit held that the Act does apply to the Navy and Marines. 490 F.2d 372 (4th Cir.). Some courts, however, have declined to apply the Act to the Navy and Marines. *See generally* Porto, *supra* note 14. at 295-98 (listing federal and state cases where courts refused to apply the Act to the Navy and Marines).

30. 18 U.S.C.A. § 1385 (West 1998). The phrase "posse comitatus" means "power of the county" and historically refers to the "population of the county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as an aid to him in keeping the peace or pursuing and arresting felons." BLACKS LAW DICTIONARY 1162 (6th ed. 1991). The Act was enacted following the post-Civil War Reconstruction Period, during which military forces were used to quell domestic disturbances, arrest Ku **Klux** Klan members, control labor unrest, and guard election polls. *See generally* Porto, *supra* note 14, at 280-82. At the end of the Reconstruction Period in 1877, Congress enacted the Act to stop the use of military forces to aid civil authorities in law enforcement. *Id.*

31. 10 U.S.C.A. §§ 371-378 (West 1998).

32. The Posse Comitatus Act also applies to federally employed civilian police and security guards performing such duties for a military commander. *See* DEP'T OF ARMY, REG. 190-56, THE ARMY CIVILIAN POLICE AND SECURITY GUARD PROGRAM, para. 5-2 (21 June 1995) [hereinafter AR 190-56] ("Civilian police and security guard personnel, while on duty at an installation, are considered part of the Army, and are therefore subject to the restrictions on aid to civilian law enforcement imposed by [the Posse Comitatus Act].").

33. 10 U.S.C.A. § 375. This section requires the Secretary of Defense to "prescribe regulations" to ensure any activity performed in conjunction with civil officials does not permit "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other activity unless participation in such activity . . . is otherwise authorized by law." *Id.*

34. *Id.*

5525.5,[35] and each military department has in turn developed regulations to implement the Directive.[36]

Numerous state and federal courts have interpreted the meaning of the Posse Comitatus Act.[37] In determining what equates to a violation of the Act, courts have generally applied three tests: (1) whether civilian law enforcement officials made "direct active use" of military personnel to execute civil laws; (2) whether the use of military personnel "pervaded the activities" of civil authorities; and (3) whether the military was used so as to subject citizens to the "exercise of military power which was regulatory, proscriptive, or compulsory in nature."[38]

Very infrequently have courts found violations of the Act.[39] A review of the cases indicates that violations have been found when military personnel provided direct support at the request of civilian authorities,[40] or when they traveled off the federal installation and participated directly in enforcing the law over civilians.[41] On the other hand, in cases where mil-

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35 DOD DIR 5525 5, ***supra*** note 14 (noting that the current Directive is dated 1986, but that the onginal Directive was published in 1982) The DOD Directive provides that, except **as** authorized by other parts of the Directive, the Posse Comitatus Act prohibits the following forms of direct assistance

1. Interdiction of a vehicle, vessel, aircraft, or other similar activity.
2. A search or seizure.
3. An arrest, apprehension, stop and frisk, or similar activity.
4. Use of military personnel for surveillance or pursuit of individuals, or **as** undercover agents, informants, investigators, or interrogators.

Id. para. E4.1.3.

36. ***See*** DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN **LAW** ENFORCEMENT (1 Aug. 1983) [hereinafter AR 500-51]; SECNAVINSTR. 5820.7B, ***supra*** note 29; **U.S.** DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 10-801, ASSISTANCE TO CIVILIAN **LAW** ENFORCEMENT AGENCIES (15 Apr. 1994) [hereinafter AFI 10-801].

37. ***See generally*** Porto, ***supra*** note 14, at 271 (listing and analyzing state and federal court decisions pertaining to the Posse Comitatus Act).

38. United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (setting out the three established tests to determine when military involvement constitutes more than just indirect assistance); ***see also*** United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994); United States v. Hartley, 678 F.2d 961, 978 n.24 (11th Cir. 1982).

39. ***See generally*** Porto, ***supra*** note 14, at 297-88.

40. ***See*** United States v. Walden, 490 F.2d 372, 374 (4th Cir.1974) (finding a violation when military investigators, at the request of federal agents, participated in sting operation of illegal firearms operation); Wrynn v. United States, 200 E Supp. 457,463-65 (E.D.N.Y. 1961) (finding a violation when military personnel flew helicopter to assist in search of escaped civilian convict).

itary officials have acted in a passive manner while assisting civil authorities, courts have not found violations.[42]

Violations of the Posse Comitatus Act could result in criminal prosecution, but since its enactment, no one has ever been prosecuted for violating the Act. Other adverse consequences, however, may result from violations. In many criminal cases, defendants have argued that a violation renders their arrest unlawful; therefore, evidence seized incident to the arrest must be suppressed under the Exclusionary Rule.[43] A review of the cases, however, reveals no federal cases and only one state case in which the Exclusionary Rule was actually applied.[44] In egregious cases, a violation may warrant a civil claim against the military department or the individual service member.[45] A review of these cases, however, reveals only one federal case in which a court supported a tort claim.[46]

There are various exceptions to the Posse Comitatus Act. Congress has enacted a number of express statutory exceptions that authorize the military to assist officials in executing civil laws–thus permitting direct military involvement in civil law enforcement. For example, military forces may assist civil authorities to quell civil disturbances or insurrection~.~Another exception, enacted as part of the 1981 amendments to the

41. *See* State v. Danko, 548 P.2d 819 (Kan. 1976) (finding violation when military policemen, while participating in an off-post "joint patrol" with civil authorities, directly participated in the search of a vehicle); Taylor v. State, 645 P.2d 522 (Okla. Ct. App. 1982) (finding violation when military investigator actively participated–including drawing his weapon–in an off-post arrest).

42. *See, e.g.*, United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988) (finding no violation where military investigator, while working undercover to identify sources providing drugs to soldiers, bought cocaine from the defendant and then turned the evidence over to civilian authorities).

43. *See* Major Timothy Saviano, International and Operational Law Note, *The Exclusionary Rule's Applicability to Violations of the Posse Comitatus Act*, ARMY LAW., July 1995, at 61.

44. Taylor v. State, 645 P.2d 522 (Okla. Ct. App. 1982) (holding that military investigator's conduct, which included drawing his weapon to effect an off-post arrest, was so excessive that the exclusion of evidence, tainted by the unlawful arrest, was warranted in this case). For an analysis of the case, *see* Saviano, *supra* note 43, at 64.

45. *See* Major Christopher O'Brien, International and Operational Law Note, *Civil Liability Under the Posse Comitatus Act*, ARMY LAW., July 1995, at 65.

46. Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988) (holding that an arrest made in violation of the Posse Comitatus Act could be considered in determining the reasonableness of a seizure, and thus a claim of statutory violation was sufficient to state constitutional tort claim for violation of Fourth Amendment rights). For an analysis of the case, *see* O'Brien, *supra* note 45.

Act, is the authority to furnish equipment and personnel to assist civil authorities in enforcing drug, immigration, and tariff laws.[48]

There are also two constitutional exceptions, based on the legal right of the United States to guarantee the "preservation of public order and the carrying out of governmental operations . . . , by force if necessary."[49] First, the "emergency authority" permits the use of armed forces to enforce civil laws to "prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden . . . civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions." and local and state authorities are unable to adequately respond.[50] Second, the "protection of federal property and functions" exception allows the use of armed forces to protect federal property and functions "when the need for protection exists and. . . local authorities are unable or decline to provide adequate protection.""

Finally, there are two "common law" exceptions. The first holds that no violation occurs when a service member assists civil law enforcement on his own initiative as a private citizen.[52] Second is the Military Purpose Doctrine which holds that no violation occurs when military personnel assist in civil law enforcement to achieve a military purpose and only incidentally benefit civil authorities.[53]

The next section more closely examines one of these exceptions, the Military Purpose Doctrine. Specifically, the next section reviews the extent to which the Military Purpose Doctrine exception permits military law enforcement officials to arrest civilians when these officials are acting pursuant to the inherent authority of their commander.

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47. See 10 U.S.C.A. §§ 331-333 (West 1998).

48. See id. §§ 371-380. For a complete list of statutory exceptions. ***see*** DOD DIR. 5525.5. ***sirpra*** note 14.

49. Employment of Military Resources in the Event of Civil Disturbances. 32 C.F.R. § 215.4c(1) (1998).

50. Id. § 215.4c(1)(i). This exception applies only in extraordinary circumstances. Some examples include: "sudden and unexpected invasions or civil disturbances. including civil disturbances incident to earthquake, fire, flood. or other public calamity endangering life or federal property or disrupting federal functions or the normal processes of government " JA **221,** *supra* note 13, para. 3-9. Furthermore. federal forces may not respond unless "duly constituted local authorities are unable to control the situation." AR 500-51. *supra* note 36. para. 3-4b(1).

III. Permissible Exertion of Authority: The Military Purpose Doctrine and the Inherent Authority of the Installation Commander

The primary legal basis for the exertion of military law enforcement authority over civilians is derived from the power of the installation commander.[54] Charged with the responsibility to maintain law and order on the installation, the commander has inherent authority over civilians who threaten the security of the installation and the safety of its occupants. As the commander's agents, therefore, military law enforcement officials may arrest civilian lawbreakers that threaten the installation. Such actions, however, may appear to violate the Possse Comitatus Act–unless an exception applies. This section reviews the most significant exception to the Act: the Military Purpose Doctrine. The doctrine will then be applied to the exertion of police power over civilians, pursuant to the commander's inherent authority, in the context of both on- and off-post encounters with civilians.

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51. 32 C.F.R. § 215.4c(1)(ii). The inherent right to protect federal property is derived from the Property Clause of the United States Constitution: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States." U.S. CONST. *art.* IV, § 3. cl. 2. Pursuant to this power, Congress has enacted statutes requiring the military departments to protect military installations and property. For example. Congress holds the Secretary of the Army responsible for the "functioning and efficiency of the Department of the Army," 10 U.S.C.A. § 3013c(1) (West 1998). and requires him to "issue regulations for the government of his department . . . and the custody, use, and preservation of its property." 5 U.S.C.A. § 301 (West 1998). Federal armed forces will be employed. however. to protect property only in the most extraordinary circumstances. ***See*** JA 221, ***sirpra*** note 13. para. 3-9:

> The right of the United States to protect federal property or functions by intervention with federal military forces is an accepted principle of our government. The right extends to all federal property and functions wherever located. This form of intervention is warranted, however. only where the need for protection exists and local civil authorities cannot or will not give adequate protection.

Id. This restrictive limitation of the application of armed forces to protect federal property is detailed in Army regulations. ***See*** AR 500-51, *supra* note 36. para. 3-4b(2).

52. ***See*** Porto, *supra* note 14, at 298-99 (listing cases where soldiers acted on their own initiative and in their private capacities to help civil authorities).

53. ***See id.*** at 299-305 (listing cases where the Military Purpose Doctrine was applied).

54. See *infra* Section III.A.1 and accompanying notes (describing installation commander's inherent authority).

A. The Military Purpose Doctrine

The Military Purpose Doctrine provides that law enforcement actions that are performed primarily for a military purpose, even when incidentally assisting civil authorities, will not violate the Posse Comitatus Act. The purpose of the Posse Comitatus Act is to limit the direct and active use of the military by civil law enforcement authorities, and to shield civilians from the exercise of regulatory or proscriptive military power.[55] It follows, therefore, that in appropriate circumstances, the military may lawfully enforce civil laws if there is an independent military purpose.[56]

The Military Purpose Doctrine has developed through case law[57] and regulatory guidance. In the 1981 amendments to the Posse Comitatus Act, Congress directed the Secretary of Defense to prescribe specific regulations to clarify the Act by prohibiting service members from directly participating in the enforcement of civil laws.[58] The Secretary promulgated *Department of Defense Directive 5525.5*, which generally prohibits direct participation, but also distinguishes those forms of direct assistance that are permissible.[59] Principle among those forms of permissible assistance are "actions . . . taken for the *primary purpose* of furthering a military . . . function of the United States."[60]

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55. *See supra* Section II.B (describing Posse Comitatus Act).

56. *See* Major H.W.C. Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*. 7 MIL. L. REV. 85. 128 (1960):

> [T]he statute is limited to deliberate use of armed force for the primary purpose of executing civilian laws more effectively than possible through civilian law enforcement channels. and . . . those situations where an act performed primarily for the purpose of ensuring the accomplishment of the mission of the armed forces incidentally enhances the enforcement of civilian law do not violate the statute.

Furman's discussion of the Military Purpose Doctrine has been quoted by several courts. *See. e.g.*, United States v. Red Feather. 392 E Supp. 916. 925 (D.S.D. 1975): State v. Nelson, 260 S.E.2d 629. 639 (N.C. 1979); Harker v. State. 663 P.2d 932. 936 (Alaska 1983); Anchorage v. King. 754 P.2d 283. 285 (Alaska App. 1988).

57. *See generally* Porto. *supra* note 14. at 299-305 (listing cases finding no violation of the Posse Comitatus Act where military authorities. although incidentally providing assistance to civil authorities. were primarily acting to achieve an independent military purpose).

58. 10 U.S.C.A.§ 375 (West 1998).

59. DOD DIR. 5525.5. *supra* note 14. at encl. 4.

Whether the Military Purpose Doctrine permits military law enforcement activities will depend on the facts of each case and the military interests that are involved.[61] Courts will ask whether an independent military purpose justified military involvement, or whether the actions were intended primarily to aid civil authorities. Certainly, military officials may travel on or off post to investigate and arrest service members for violations of the UCMJ.[62] But when their law enforcement activities affect civilians. the rules are less clear.

B. Applying the Military Purpose Doctrine on the Federal Military Installation

One category of law enforcement activity that is generally deemed to be permissible under the Military Purpose Doctrine is "investigations or other actions related to the commander's inherent authority to maintain law and order on a military installation or facility."[63] This section defines the commander's inherent power to maintain law and order on the installation, and then determines the level of authority that military law enforcement officials derive from the commander to enforce civil laws.

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60. *Id.* (emphasis added). The directive states that the "military purpose" provision must be "used with caution, and does not include those actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions" of the Act. *Id.* encl. **4,** para. 1.2.1. The Directive provides that permissible actions may include the following:

> 1. Investigations and other actions related to enforcement of the Uniform Code of Military Justice (UCMJ).
> 2. Investigations and other actions that are likely to result in administrative proceedings by the Department of Defense, regardless of whether there is a related civil or criminal proceeding.
> 3. Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility.
> 4. Protection of classified military information or equipment.
> 5. Protection of DOD personnel, DOD equipment, and official guests of the Department of Defense.
> 6. Such other actions that are taken primarily for a military or foreign affair's purpose.

Id. encl **4,** paras. 1.2.1.1-1.2.1.6.

61. *Id.* encl. 4, para. 1.2.1.

62. Military officials have worldwide statutory arrest authority over service members for violations of the UCMJ. UCMJ arts. 5, 7(b) (West 1998).

1. Inherent Authority of the Installation Commander

The commander of a military installation has the inherent authority and responsibility to maintain law and order, security, and the discipline necessary to assure the proper functioning of the command.[64] The commander's authority is derived from the President who, as Commander-in-Chief, is responsible to ensure order and discipline is maintained in the Armed Forces.[65] His authority is also derived from Congress, which has the power, under the Property Clause of the U.S. Constitution, to "make all needful Rules and Regulations respecting the territory or other property belonging to the United States."[66] This authority is delegated by statutes[67] and implementing regulations[68] that hold the commander responsible for the maintenance and efficient operation of the installation.

In particular, two criminal statutes recognize the authority of the commander to maintain law and order. The Trespass Statute[69] makes it unlaw-

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63. DOD DIR. 5525.5, ***sirpra*** note 14, encl. 4, para. 1.2.1.3. The Directive also cites. as permissible activity, "Investigations and other actions that are likely to result in administrative proceedings by the Department of Defense. regardless of whether there is a related civil or criminal proceeding." *Id.* encl. 4, para. 1.2.1.2. For example. an administrative proceeding may be the issuance of a "bar letter" to a civilian lawbreaker. See 18 U.S.C.A. $ 1382 (West 1998) (allowing a commander to prohibit a person from entering a military installation). Actions taken to effect the proceeding, such as arrest. detention for a period long enough to coordinate a bar letter. and physical removal from the installation are all permissible actions that accomplish the military purpose.

64. Military Police Authority. Op. Admin. L. Div., OTJAG. Army. DAJA-AL 1984/ 2412 (3 Aug. 1984): Arrest and Transportation of Civilians. Op. JAG, Air Force. No. 43 (5 May 1986) ("The power to maintain order, security, and discipline on a military installation is inherent in the authority of the military commander.").

65. U.S. CONST. art II, § 1.

66. *Id.* art. IV, § 3, cl. 2.

67. For example. Congress holds the Secretary of the Army responsible for the "functioning and efficiency of the Department of the Army." 10 U.S.C.A. § 3013c(1) (West 1998). and requires him to "issue regulations for the government of his department . . . and the custody. use. and preservation of its property." 5 U.S.C.A. § 301 (West 1998).

68. *See, e.g.*, DEP'T OF DEFENSE, DIR. 5200.8. SECURITY OF MILITARY INSTALLATIONS, para. 3.2 (25 Apr. 1991) [hereinafter DOD DIR. 5200.81 (declaring authority of installation commander to take reasonably necessary and lawful measures to maintain law and order on the installation); U.S DEP'T OF ARMY, REG. 210-10, INSTALLATIONS ADMINISTRATION, para. 2-9 (12 Sept. 1977) [hereinafter AR 210-10] ("The installation commander is responsible for maintenance of law and order at the installation."): DEP'T OF ARMY, REG. 190-13. PHYSICAL SECURITY: THE ARMY PHYSICAL SECURITY PROGRAM, para. 1-5q(1) & app. D (30 Oct. 1993) [hereinafter AR 190-13] (designating installation commanders as having "authority to enforce the necessary regulations to protect and secure places and property under their command").

ful for a person to enter an installation for an unlawful purpose and authorizes the commander to expel and prohibit the re-entry of violators.[70] The Internal Security Act of 1950[71] makes it a criminal misdemeanor to violate any "regulation or order" issued by any "military commander designated by the Secretary of Defense" for the "protection or security of property and places subject to his jurisdiction.[72]

The United States Supreme Court has recognized the commander's inherent authority to preserve order. In *Greer v. **Spock,*** the Court noted the "historically unquestioned power" of a commander to prevent civilian disruptions on a military installation.[73]

The Military Purpose Doctrine requires a legitimate, independent military purpose for participating in law enforcement activities against civilians. The inherent authority–and responsibility–of the commander in maintaining law and order on the installation is clearly a valid military purpose.

2. The Authority of Military Law *Enforcement Officials on the Installation*

The law enforcement authority of the installation commander flows to military law enforcement officials.[74] With this authority, military law enforcement officials have the power to arrest[75] civilian lawbreakers for

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69. 18 U.S.C.A. § 1332 (West 1998) ("Whoever, within the jurisdiction of the United States, goes upon any military . . . installation, for any purpose prohibited by law or regulation; or whoever reenters . . . such installation after having been removed therefrom or ordered not to enter by the officer in command thereof, shall be [guilty of a misdemeanor].").

70. The authority of the commander to expel a civilian from the installation arguably implies the authority to arrest and detain a lawbreaker long enough to write a "bar letter," escort the individual off the installation, or deliver him to civil authorities.

71. 50 U.S.C.A. § 797 (West 1998). This statute is implemented in DOD by DOD Directive 5200.8, which designates those "commanders authorized to issue regulations for the protection or security of property or places under their command in accordance with the Internal Security Act. See DOD DIR. 5200.8, ***supra*** note 68.

72. 50 U.S.C.A. § 797.

73. Greer v. Spock, 424 U.S. 828, 838 (1976); ***see** also* Cafeteria Workers v. McElroy, 367 U S . 886, 892-93 (1961) (recognizing military commander's power to preserve order among civilians on the installation and holding, "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.").

the military purpose of maintaining law and order on the installation. This subsection reviews the extent of this power.[76]

Although military law enforcement officials have no specific statutory grant of formal arrest authority over civilians,[77] it is generally accepted that they may arrest civilians on the installation.[78] The arrest power is limited, however, to a reasonable period of time sufficient to investigate the crime and transfer the lawbreaker to civil authorities with criminal jurisdiction for purposes of prosecution.[79]

What is a "reasonable period of time" will depend on the circumstances of the case. In *United States v. Matthews*,[80] military police detained a civilian for ten hours, subjected him to questioning by various investigators, and searched his person and vehicle. The Tenth Circuit Court of Appeals found the arrest to be properly based on probable cause and the detention to be a reasonable period to investigate whether a crime had in fact been committed.[81] In a recent case, *United States v. Mullin*,[82] the Fifth Circuit Court of Appeals held that a twenty-two hour detention was reasonable where the suspect had concealed his age and identity and

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74. Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984) (describing military police as "acting as agents of the installation commander, vis-à-vis civilians who threaten or impede the normal functioning of the command by conduct which is criminal or otherwise proscribed by appropriate regulations").

75. Again, "arrest" in this article refers to the commonly used, conventional civilian term developed in the common law. Through a series of Fourth Amendment cases. the United States Supreme Court has attempted to define arrest. ***See, e.g.***, Florida v. Royer, 460 U.S. 491 (1983). In its basic form, "arrest occurs when a person's liberty has been restricted by law enforcement officers to the extent that he is not free to leave at his own volition." WHITEBREAD & CHRISTOPHER *supra* note 5, § 3.02.

76. Although not addressed in this section, another legal basis for the power of military law enforcement officials to arrest civilian lawbreakers on the installation is a "citizen's arrest." In ***United States v. Mullin,*** the Fifth Circuit Court of Appeals recently reviewed a case in which Fort Hood military police arrested a civilian after observing him burglarize a car on the installation. United States v. Mullin, No. 97-50904, 1999 U.S. App. LEXIS 12092 (5th Cir. June 10, 1999). The Court held that, "although military police are not designated peace officers under [Texas law], they can make an arrest when Texas law authorizes such an arrest by a 'private person."' ***Id.*** at *8. Because "citizen's arrest" was a sufficient basis to warrant the arrest on the facts at hand, the Court did not consider other potential legal bases for military officials to arrest civilians. ***Id.*** The Court did not discuss the "inherent authority of the installation commander'' as a legal basis. ***See id.*** This article will discuss the concept of "citizen's arrest" more fully in Section IV.B.1, ***infra.***

77. ***See supru*** Section II.A (describing lack of specific Congressional grant of statutory arrest powers).

military police investigators had made diligent efforts to involve civil

78. **See** Use of Military Personnel to Maintain Order Among Cuban Parolees on Military Bases, 4 Op. Off. Legal Counsel 643,646 (1980) (opinion of Assistant Attorney General of the United States that military law enforcement officials clearly have authority to arrest civilians on military bases when they are a threat to good order and discipline of the base, and that they may use sufficient force necessary to effect such arrests); Law Enforcement at San Onofre Nuclear Generation Plant. 1 Op. Off. Legal Counsel 204, 206 (1977) (opinion of Deputy Assistant Attorney General of the United States that, when on a military installation, military law enforcement officials may apprehend civilian lawbreakers without violating the Posse Comitatus Act); Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984) (opining that a California state law cannot limit on-post apprehension authority of military police as to "civilians who threaten or impede the normal functioning of the command by conduct which is criminal or otherwise proscribed by appropriate regulations" and that military police may eject civilians from the installation, serve them with citations to U.S. District Court, or detain them pending transfer to civil authorities); Civilian Police/Guard Authority and Liability, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 197913255, para. 1b (14 Sept. 1979) (opining that military law enforcement officials may "apprehend and detain . . . civilians when on-post and for offenses committed on-post under the general authority of the installation commander to maintain law and order on the installation"); 53 **Am. Jur.** 2d *Military Installations* § 246 (1995) ("Military personnel are authorized by the statutory powers regarding unlawful reentry onto a military reservation . . . to arrest and detain civilians for on base violations of civil law where their actions are based on probable cause.").

Again, as stated earlier in this article, there is some resistance by military legal advisors to acknowledge that military law enforcement officials are "arresting" civilians. See ***supra*** note 5 (reviewing of Air Force Judge Advocate General's opinion that military law enforcement authorities may not "arrest" but may "detain" civilians for reasonable periods, based on probable cause, pending transfer to civil authorities). For Fourth Amendment purposes, however, "detaining civilians pending transfer to civil authorities" is nevertheless an arrest. In a civilian criminal court, a judge is going to analyze the military's "detention" as an arrest.

79. DOD Dir 5200.8, ***supra*** note 68, para. 3.2.4 (authorizing commander of installation to detain civilians who violate the Trespass Statute, 18 U.S.C.A. § 1382 (West 1998), until civil authorities can respond); AR 190-30, supra note 3, para 4-8 ("Civilians committing offenses on U.S. Army installations may be detained, until they can be released to the appropriate federal, state, or local law enforcement agency."); AR 195-2, ***supra*** note 26, para. 3-3l. Agents of the United States Army Criminal Investigation Command are

> authorized to apprehend civilians on military installations or facilities where there is probable cause to believe that person has committed an offense cognizable under the criminal laws of the United States. Such persons will be held only until they can be released to an appropriate Federal, State, or local law enforcement agency, or to civilian authorities in accordance with local procedures.

Id.

80. 615 F.2d 1279 (10th Cir. 1980)

81. *Id.* at 1284.

authorities.[83]

Perhaps the most generous case for defining the power of military law enforcement officials on the installation is a Ninth Circuit case, *United States v. Banks*.[84] In *Banks*, Air Force security police arrested the civilian defendant in a barracks room on an Air Force base for possession of drugs. The defendant argued that the Posse Comitatus Act prohibited the Air Force from arresting him; thus, the evidence seized incident to the arrest should be suppressed.'' The Ninth Circuit held that, when their actions are based on probable cause, military law enforcement personnel may arrest and detain civilians for on-base criminal violations.[86] In a statement that aligns well with the "Military Purpose Doctrine," the court held that the "power to maintain order, security, and discipline on a military reservation is necessary to military operations.''[87] Thus, the court held, the Posse Comitatus Act "does not prohibit military personnel from acting upon on-base violations committed by civilians."''

In *Anchorage v. King*,[89] the Alaska Court of Appeals reviewed whether Air Force security police at an installation entrance gate could arrest an intoxicated motorist entering the installation and turn him over to civil authorities. Applying the Military Purpose Doctrine, the court held that the gate guard had an "independent military duty and purpose to pro-

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82. United States v. Mullin. No. 97-50904. 1999 U.S. App. LEXIS 12092 (5th Cir. June 10. 1999).

83. *Id.* at *16-17.

84. 539 F.2d 14 (9th Cir. 1976).

85. *Id.* at 15.

86. *Id.* at 16. The court cites the Trespass Statute. 18 U.S.C.§ 1382, without comment as to how it provides the legal authority for arrest power. The court apparently concludes that the Trespass Statute, which permits the commander to expel and prohibit the re-entry of a civilian, implies the power to arrest.

The court also held that military personnel have the authority to interrogate and. upon probable cause or incident to arrest, search a civilian lawbreaker. *Banks*, 539 F.2d at 16.

87. *Banks*. 539 F.2d at 16 (citing Cafeteria Workers v. McElroy. 367 U.S. 886 (1961), a seminal case recognizing the inherent authority of the installation commander).

88. *Id.* Another case that broadly recognizes on-post arrest powers is *Kennedy v. United States*. 585 F. Supp. 1119 (D.S.C. 1984), a case involving a claim of false arrest under the Federal Tort Claims Act. In *Kennedy*. the District Court of South Carolina held: "Military police are law enforcement officers who possess power to make arrests for violations of [flederal law. While they normally confine their activities to enforcement of military law, they do possess all powers that civilian law enforcement officers have. *on* military property." *Kennedy*. 585 F. Supp. at 1123 (emphasis added).

89. 754 P.2d 283 (Alaska App. 1988).

tect the welfare of persons on base," which justified the military involvement.[90]

Through numerous federal and state court decisions and regulatory guidance, the arrest authority of military law enforcement officials over civilian lawbreakers on the installation is generally settled. Their power is derived from the installation commander's inherent authority to maintain law and order on the installation. Furthermore, their actions are protected by the Military Purpose Doctrine from violating the Posse Comitatus Act. At a minimum, military officials may, with probable cause, arrest a civilian and detain him for a reasonable period while pending transfer to civil authorities. Much less clear, however, is the authority of military law enforcement officials once they cross the boundaries of the installation.

C. Application of the Commander's Inherent Authority and the Military Purpose Doctrine Off the Federal Installation

In some circumstances, the commander's inherent authority and responsibility to protect the installation will necessitate off-post law enforcement activities. As they depart the installation, however, the authority of military law enforcement officials will decrease. When acting on the installation regarding an on-post crime, military law enforcement officials may arrest, detain, interrogate, and search the suspect.[91] But, off the installation, their actions are much more limited by the Posse Comitatus Act. The Military Purpose Doctrine generally will permit only those actions that support a legitimate military purpose. Unless a nexus is found, whereby *off*-post criminal activity somehow adversely impacts the maintenance of law and order on the installation, the military's interest will be too remote. But, where a legitimate, independent military purpose exists, military law enforcement officials are authorized to conduct activities, although mainly investigatory. This subsection reviews the authority of military law enforcement officials to travel off-post and investigate criminal activities.

In Department of *Defense* Directive *5525.5,* the Secretary of Defense provides regulatory guidance on the Military Purpose Doctrine and lists

90. *Id.* at 286. The court noted that the security policeman's subsequent actions, including transportation to the local police station, signing the complaint, and transportation to a magistrate, were all performed with the same independent purpose, and were thus permissible.

91. *Bunks,* 539 F.2d at **14.** See *generally supra* Section II.A.2.

various law enforcement activities that, while directly assisting in the enforcement of civil laws, do not violate the Posse Comitatus Act.[92] The directive does not limit such permissible activities to on-post law enforcement; these activities apply *off post* as well. In off-post law enforcement operations involving civilians,[93] the most applicable category of permissible action is "investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation."[94] In other words, when off-post criminal activity adversely impacts the welfare of persons and the efficiency of operations on post, a legitimate, independent military purpose exists.

The "criminal investigation" is the primary form of law enforcement activity in which military law enforcement officials engage off the installation.[95] Military law enforcement officials have investigative authority[96] wherever a legitimate military interest exists.[97] A military interest in civilian criminal activity exists when the military is a victim of a crime (such as the theft or destruction of government property, or fraud) or there is a need to protect personnel, property, or activities on the military installation (such as the introduction of illegal drugs onto the installation).[98]

The most common type of off-post investigation of civilians is the investigation of illegal drug distribution. The Department of Defense has

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92. DOD DIR. 5525.5, *supra* note 14, encl. 4, para. 1.2.1.

93. The authority of military law enforcement officials to investigate and arrest service members is worldwide. UCMJ art. 5 (West 1998); see AR 195-2, *supra* note 26, para. 3-2I (authorizing Army CID agents to "apprehend persons subject to the UCMJ. regardless of location").

94. DOD DIR. 5525.5, *supra* note 14, encl. 4, para 1.2.1.

95. Section IV, *infra,* will discuss two other forms of off-post law enforcement: "hot pursuit" of a law breaker who departs the installation, and "emergency response" to an off-post crime in progress.

96. "Investigative authority" exists when the investigative agency has the "legal authority (jurisdiction) to conduct a criminal investigation." AR 195-2, *supra* note 26, para. 3-1(a). *See also* JA-221. *supra* note 13. para. 3-1 ("As long as the military pursues the investigation of an offense with a view toward establishing facts to sustain a court-martial or to pursue a legitimate military function or purpose. then any incidental investigative benefit to civilian law enforcement officials is immaterial.").

97. See. *e.g.*, AR 195-2, *supra* note 26. para. 3-1 ("The Army has investigative authority whenever an Army interest exists and investigative authority has not been specifically reserved to another agency."). Another limitation is that the offense must not be within the investigative purview of the Department of Justice (DOJ). which would require deference to the DOJ investigative authority pursuant to inter-agency agreement. *Id.* (citing Memorandum of Understanding between the Department of Defense and Department of Justice relating to the investigation and prosecution of certain crimes).

explicitly declared, as policy, that the suppression of drugs being introduced onto military installations is an "important military interest."[99] Thus, while recognizing that the "investigation of drug offenses outside the military installation normally is the responsibility of non-DOD law enforcement officials," Department of Defense policy authorizes military law enforcement officials to undertake such investigations with respect to both service members and civilians.[100] The policy does, however, specifically prohibit direct participation in enforcing the law, such as searches, arrests, or apprehensions of civilians, unless otherwise authorized by law.[101] The Department of Defense has concluded that such direct

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98. ***See, e.g.***, ***id.***

> Generally, an Army interest exists when one or more of the following apply: . . . **(4)** The Army is the victim of the crime; e.g., the offense involves the loss or destruction of government property or allegations of fraud . . . relating to Army programs or personnel. (5) There is a need to protect personnel, property, or activities on Army installations from criminal conduct on military installations that has a direct adverse effect on the Army's ability to accomplish its mission; e.g., the introduction of controlled substances onto Army installations.

Id.

99. Policy Memorandum Number 5, Inspector General, Department of Defense, subject: Criminal Drug Investigative Activities (1 Oct. **1987)** [hereinafter Policy Memorandum 5] ("Drug offenses by DOD personnel and the introduction of drugs onto military installations adversely affect the efficiency and effectiveness of DOD programs.").

100. *Id.* The policy memorandum instructs the secretaries of the military departments to prescribe regulations to guide such investigations. *Id.* The regulations must allow drug investigations only where a military interest is clearly present. *Id.* As an example, see AR **195-2,** ***supra*** note **26,** para. **3-32.**

> A particular drug operation should not be conducted unless there is an identifiable connection between the drug traffickers being investigated and the **U.S.** Forces personnel. Such connection is present only if the traffickers are known or suspected to have had recent drug transactions with **U.S.** Forces personnel or if the traffickers distribute in an area where experience indicates a substantial portion of the available drug supply is obtained by U.S. Forces personnel.

Id.

The military departments may limit off-post investigative authority to certain types of law enforcement officials. The Army, for example, limits off-post investigative authority to agents of the U.S. Army Criminal Investigation Command (USCIDC). ***Compare*** AR 195-2, ***supra*** note **26,** para. **3-21** ***with*** AR **190-30,** ***supra*** note 3, para. **4-2** (stating that military police investigators, who are not members of USCIDC, have *no* investigative jurisdiction over criminal incidents occurring off the installation).

actions–while permissible on the installation–are beyond the scope of the military's authority, are without sufficient military interest,[102] and would perhaps violate the Posse Comitatus Act.

Both federal and state courts have reviewed cases where a "military purpose" was proposed as justification for off-post drug investigations."' Courts have generally held that, where the military involvement is limited, and where there is an independent military purpose of preventing the flow of drugs onto the installation, the actions of military law enforcement officials will not violate the Posse Comitatus Act.[104] Generally, as long as military law enforcement officials do not "pervade" the activities of civil officials and do not subject citizens to the "regulatory exercise of military power," their actions will be permissible.[105]

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101. Policy Memorandum 5. *supra* note 96, para. 4.c(5); see AR 195-2, *supra* note 26, para. 3-1c.

> No USACIDC personnel, in their official capacity, have authority to arrest, with or without an arrest warrant, civilians outside the limits of a military installation. When such an arrest is necessary in the conduct of a CID investigation. an arrest warrant must be obtained and executed by a civil law enforcement officer with statutory arrest authority. CID agents may accompany the arresting civil law enforcement official for purposes of identifying the person to be arrested and providing back up assistance.

Id.

102. While the military has a clear interest in investigating drug operations, the authority to effect an arrest or search is not essential, since military law enforcement officials can coordinate in advance with civil authorities if the need may exist. ***See, e.g.***, AR 195-2, ***supra*** note 26, paras. 3-21, 3-22 (requiring Army criminal investigation agents to have civil authorities obtain and execute *arrest* warrants when necessary, and–although ***permitting*** agents to obtain off-post ***search*** warrants on their own–requiring them to be accompanied by a civil law enforcement authority when executing the search warrant).

103. ***See generally*** Porto, ***supra*** note 14, at 288-95 (reviewing cases where passive participation by military law enforcement was held not to violate the Posse Comitatus Act).

104. ***See*** Hayes v. Hawes, 921 F.2d 100, 103 (7th Cir. 1990) (reviewing several federal and state cases involving military law enforcement in off-post drug investigations); Harker v. State, 663 P.2d 932. 936 (Alaska 1983) ("In the majority of cases in which no violation has been found. the independent military purpose that justified the military conduct was the prevention of illicit drug transactions involving active duty military personnel regardless of whether such conduct took place on military installations.").

105. United States v. Bacon. 851 F.2d 1312, 1313 (11th Cir. 1988); ***see*** United States v. Hartley, 796 F.2d 112, 114 (5th Cir. 1986) (holding that military involvement must be "pervasive" to violate the Act).

Violations of the Act have been found where military law enforcement officials were acting *at the request of* civil officials, and thus not for an independent military purpose,[106] and where military officials did have a valid military purpose, but exceeded the bounds of their authority by *participating directly* in the enforcement.[107] In *Taylor v. State*,[108] a military investigator requested civilian authorities to assist him in conducting a joint investigation of an off-post drug dealer. Acting undercover,[109] the investigator purchased drugs from the dealer, and an arrest followed. The military investigator then "actively participated" by drawing his weapon to effect the arrest, searching the house, seizing the illegal drugs, and delivering the drugs to a lab for testing.[110] The Oklahoma Court of Criminal Appeals found that the military participation was excessive and thus violated the Posse Comitatus Act.[111]

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106. *See, e.g.*, United States v. Walden, 490 F.2d 372, 374 (4th Cir. 1974) (finding a violation when Marine investigators, at the request of civilian authorities, participated in undercover sting of illegal firearms sales operation).

107. *See, e.g.*, State v. Danko. 578 P.2d 819 (Kan. 1976) (finding violation where military policeman, while participating in a joint patrol program with local police, conducted search of a vehicle).

108. 645 P.2d 522, 523 (Okla. Crim. App. 1982).

109. One commentator has reviewed whether the actions of a military undercover agent subjects civilians to the unlawful exercise of military power. *See* Colonel Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 128-33 (1984). If the agent arrests or searches the civilian, courts will likely find that he violated the Posse Comitatus Act. *Id.* But a review of the case law reveals that, as long as the investigator can show a military connection apart from a mere assertion of authority over civilians. courts are generally satisfied that the Military Purpose Doctrine is the basis, and a violation of PCA has not occurred. *Id.* It must be shown that the off-post investigative activities served to accomplish official military functions related to protecting discipline, morale, safety, and security of the installation. *Id.*

110. *Taylor*, 645 P.2d at 523.

111. *Id.* at 525. The court also held that the violation was significantly egregious to warrant suppression of the evidence seized during the search incident to the arrest. *Id.* The court noted that violations of the Posse Comitatus Act do not necessitate application of the exclusionary rule, that violations are not of the same magnitude as violations of the Fourth Amendment, and that numerous state and federal courts had declined to apply the exclusionary rule to violations of the Act. *Id.* at 524. But, the court held that each case must be looked at individually to determine whether the conduct rose to an intolerable level justifying application of the rule. *Id.* This case appears to be the only reported case where the exclusionary rule was applied to address a Posse Comitatus Act violation. *See* Saviano, *supra* note 43, at 64 (noting that while three state court decisions had applied the exclusionary rule. two were reversed on appeal, leaving *Taylor v. State* as the only valid state court decision).

In sum, the commander's inherent authority and the Military Purpose Doctrine provide the legal bases for military law enforcement officials to arrest, interrogate, detain, and search civilians for on-post violations. These legal bases also support *off-post* investigations when the military has a clear interest in stopping the criminal activity involved, such as illegal drug distribution to service members. Off-post investigations, however, are generally limited by case law and Department of Defense policy to *passive* participation. Direct help, such as arrests and searches conducted by military officials, will likely violate the Posse Comitatus Act by "pervading" the authority of civil law enforcement. Fortunately, in the context of investigations, military investigators have sufficient time to coordinate in advance with civil authorities if they expect an arrest or search to be necessary.

What about when there is no time? The next section analyzes two off-post scenarios where military law enforcement officials must react immediately—and will necessarily participate "directly" by conducting an arrest.

IV. Authority of Military Law Enforcement in Hot Pursuit and in Response to Emergencies

The opening scenario to this article posed a dilemma that military law enforcement officials are likely to encounter: can they pursue a lawbreaker who leaves the installation? What may they do if they catch the lawbreaker? Another questionable scenario is an off-post "emergency in progress." What if a military law enforcement official, positioned at the entrance gate of an installation, observes a crime in progress just off the installation—one in which human safety is at risk, such as a robbery? Or, what if the same official is approached by a frantic person who begs for assistance in stopping a violent crime in progress "just down the street"?"?

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112. In January 1996, at Fort Campbell, Kentucky, this type of situation occurred. Two military policemen were guarding the main entrance gate to the installation when three soldiers in a car drove up to the gate and frantically begged for assistance in stopping a fight that was in progress less that one quarter mile from the gate. The soldiers excitedly claimed that their friends were being "pummeled' by a group of violent civilians. The military police refused to assist, stating that it was outside their jurisdiction. Minutes later, one soldier and one civilian were dead.

As this section will establish, the military police at Fort Campbell could have responded to this emergency. The state "citizen's arrest" law would have provided sufficient legal basis for the exertion of authority. Additionally, since there was a "military purpose" involved (protecting service members), the military policemen were not at **risk** of violating the Posse Comitatus Act.

In both scenarios, time is of the essence–there will be no call to the local sheriff for coordination. The action will not be "indirect" or "passive"–rather, it will be *direct*, and may involve the use of force. This section examines the legal bases that may justify a military official's response in these scenarios.[113]

A. Hot Pursuit

"Hot pursuit," also known as "fresh pursuit," refers to the "common-law right of a police officer to cross jurisdictional lines to arrest a felon."[114] If a military law enforcement official is in hot pursuit of a civilian lawbreaker, he must know whether he can legally follow the person off the installation. If he catches and stops the person, he must know what authority he has–if any–to arrest, search, and transport the person back to the installation.

There are no statutes, regulations, military department directives, or appellate court cases that squarely address the authority of a military law enforcement official to engage in an immediate off-post pursuit. This subsection, therefore, reviews two alternative legal bases for this type of pursuit: (1) extension of the commander's inherent authority and the Military Purpose Doctrine, as discussed in Section II, and (2) the common law doctrine of extraterritorial authority to conduct a warrantless arrest in hot pursuit.

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113. There will be some overlap in the proposed legal bases. In the context of "hot pursuit," arrest power is based on the inherent authority of the installation commander to maintain law and order on the installation (and the Military Purpose Doctrine) and on the common law doctrine of extraterritorial arrest authority when in hot pursuit. For the "emergency response" to a crime in progress, "citizen's arrest" authority provides the only legal basis. The citizen's arrest authority, however, also supports the exertion of authority while in hot pursuit: once an officer crosses outside his territorial jurisdiction, he has *at least* the powers of an ordinary citizen of that state. The distinction is that, with the common law doctrine of extraterritorial authority, the officer who is in hot pursuit assumes the authority of a law enforcement official in the jurisdiction where he finds himself–he is not just an ordinary citizen. Thus, the reader should understand that this section presents only the doctrine of extraterritorial jurisdiction as authority during hot pursuit; the citizen arrest authority discussed in Section IV.B.1, *infra*, will also provide legal authority for an arrest in hot pursuit.

114. BLACKS LAW DICTIONARY 667 (6th ed. 1990); **see 6A** C.J.S. *Arrest* § 18 (1975) ("[C]lose pursuit. . . is pursuit instituted immediately and with intent to recapture or reclaim, as where a thief is fleeing with stolen goods . . . .").

1. Hot Pursuit as a Military Purpose

In appropriate circumstances, the commander's inherent authority to maintain law and order *on* the installation will provide the legal basis for pursuing a civilian lawbreaker *off* the military installation. Under the Military Purpose Doctrine, since the pursuit will achieve an independent military purpose, there will be no violation of the Posse Comitatus Act.[115]

Courts reviewing whether military law enforcement officials violated the Posse Comitatus Act have generally held that, where military involvement is limited and there is an independent military purpose to justify the activity, no violation will occur.[116] In addition, the involvement must not "constitute the exercise of regulatory, proscriptive, or compulsory military power," must not amount to "direct active involvement in the execution of the laws," and must not "pervade the activities of civil authorities."[117]

The independent military purpose in the "hot pursuit" scenario is clear. The commander has the authority and the responsibility to maintain law and order on the installation.[118] Military law enforcement officials, as the commander's agents, have the responsibility to protect the installation from criminals. When they pursue a lawbreaker, the pursuit is for this independent military purpose, and not to aid civil authorities, that may have no interest at all in pursuing the lawbreaker.[119] As they cross the installation boundaries to pursue a lawbreaker, they carry the commander's inherent authority with them.

One challenge to this theory is that, once the lawbreaker is chased off the installation, the safety of the installation is restored and the military no longer has an independent interest in pursuit. A similar argument was made by the defendant in *Anchorage v. King*,[120] an Alaska Court of Appeals case in which an intoxicated driver was stopped at the entrance gate to an Air Force base. The driver offered to not enter the installation, but the gate guard apprehended him nevertheless. The court dismissed the

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115. *See* DOD DIR. 5525.5, *supra* note 14, encl. 4 para. 1.2.1.

116. *See, e.g.*, Hayes v. Hawes, 921 F.2d 100, 103 (7th Cir. 1990); Harker v. State, 663 P.2d 932, 936 (Alaska 1983).

117. United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (setting out the three established tests to determine when military involvement constitutes more than just indirect assistance); see United States v. Hartley, 678 F.2d 961, 978 n.24 (11th Cir. 1982); United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994).

118. See *supra* Section III.A.1 (describing inherent authority of the installation commander to maintain law and order, security, and discipline on the installation).

defendant's argument that his departure would serve the military's purpose, stating that "the military's independent purpose to protect the welfare of persons on base includes the duty to ensure that on-base DWI offenders are prosecuted, so that future offenders will be deterred."'' Thus, in cases of egregious crimes[122] that must be deterred, the military has a clear interest in pursuing the lawbreaker.

A hot pursuit is unlikely to violate the Posse Comitatus Act by "pervading'' the activities of civil law enforcement officials. Hot pursuit will occur infrequently, and each pursuit will be an isolated event, unlikely to attract much interest by civil authorities unless the chase itself becomes a danger to the community. Furthermore, actions that are taken will be the minimum necessary to stop the fleeing lawbreaker and to transport him back to the installation for interrogation, search, and eventual transfer to civil authorities or release.

Two courts have found violations of the Posse Comitatus Act by military officials when civil authorities *requested* direct assistance from the military.[123] In these cases, since the military's actions were primarily to aid civil authorities–even if incidentally beneficial to the military–the actions did not satisfy a military purpose. In the context of a hot pursuit,

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119. Once the lawbreaker is pursued and arrested, he may be returned to the installation where law enforcement officials have various options. In egregious cases, he may he held. pending transfer to civil authorities. For example, if the installation has concurrent jurisdiction, state authorities may assume jurisdiction and prosecute the offender. In less egregious cases, the official may cite the civilian with DD Form 1805 (United States District Court Violation Notice), which refers the case as a misdemeanor to U.S. District Court before a U.S. Magistrate. Finally, the law enforcement official may obtain a "bar letter" from the installation commander. banning the civilian from re-entry onto the installation. See 18 U.S.C.A. § 1382 (West 1998) ("Whoever. within the jurisdiction of the United States, goes upon any military . . . installation, for any purpose prohibited by law or regulation; or whoever reenters . . . such installation after having been removed therefrom or ordered not to enter by the officer in command thereof, shall be [guilty of a misdemeanor].").

120. 754 P.2d 283 (Alaska App. 1988).

121. *Id.* at 286.

122. Certainly, military law enforcement officials may not pursue lawbreakers for every criminal act. Because of the dangers involved in a police chase, officials should pursue only the most egregious offenders.

123. See United States v. Walden, 490 F.2d 372, 374 (4th Cir.1974) (finding violation when Marine investigators, at the request of civilian authorities, participated in undercover sting of illegal firearms sales operation); Wrynn v. United States, 200 F. Supp. 457, 463-65 (E.D.N.Y. 1996) (finding violation where military pilot, at the request of state authorities, flew a helicopter off the base to search for an escaped convict).

however, the actions of military law enforcement officials will be wholly at their *own independent initiative* and not primarily to aid civil authorities.

Another factor that courts consider is whether the actions were limited and "indirect."[124] In the context of a hot pursuit, the actions of military law enforcement will necessarily be direct. But, such direct action does not necessarily mean that a violation has occurred. In two cases where violations were found due to overly direct participation in enforcing civil laws, the military law enforcement officials involved did not *have to* engage in the direct acts.[125] Civil authorities were present in both cases and were capable of enforcing the law, but the military officials nevertheless participated by effecting the arrest or conducting a search. During a hot pursuit, civil authorities will not likely be available; it is reasonable to expect, therefore, that military officials in such circumstance have no other option but to use direct action to subdue the fleeing criminal.

In sum, application of the commander's inherent authority and the military purpose analysis in the hot pursuit context is not greatly different from the analysis in on-post arrests and in off-post investigations. Generally, if there exists a legitimate, independent military interest, the activity will be lawful and no violation of the Posse Comitatus Act will occur. The following subsection provides an alternative legal basis: the common law doctrine of extraterritorial authority when in hot pursuit.

2. *Common Law Doctrine of extraterritorial Authority to Arrest When in Hot Pursuit*

The common law doctrine of "hot pursuit" provides that a law enforcement officer may pursue a felon or a suspected felon outside his territorial jurisdiction and arrest him there.[126] This subsection reviews the

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124. United States v. Bacon, 851 F.2d 1312. 1313-14 (11th Cir. 1988).

125. *See* State v. Danko, 578 P.2d 819 (Kan. 1976) (finding violation where military policeman. while participating in a joint patrol program with local police. conducted search of a vehicle); Taylor v. State. 645 P.2d 522. 523 (Okla. Crim. App. 1982) (finding violation where military investigator "actively participated" by drawing his weapon to effect the arrest, searching the house. seizing the illegal drugs. and delivering the drugs to a lab for testing).

126. *See* Stevenson v. State, 413 A.2d 1340. 1343 (Md. 1980); Molan v. State, 614 P.2d 79, 80 (Okla. Crim. App. 1980); State v. Slawek, 338 N.W.2d 120. 123 (Wisc. App. 1983); Wright v. State, 473 A.2d 530, 533 (Md. Ct. Spec. App. 1984); Six Feathers v. State. 611 P.2d 857 (Wyo. 1980) (citing 5 AM. JUR 2D); *see generally* 5 AM. JUR. 2D *Arrest* § 72 (1995); 6A C.J.S. *Arrest* § 53 (1975).

common law hot pursuit doctrine and determines its application to the military law enforcement official pursuing a civilian lawbreaker off the installation.

As a general rule, a law enforcement officer who is acting outside his territorial jurisdiction acts beyond his official capacity and, thus, has no official police power to arrest.[127] The hot pursuit doctrine recognizes that a criminal may "head straight across jurisdictional lines, following commission of a crime, knowing that there is safety on the other side."[128] The doctrine dispels this fiction by authorizing a pursuing law enforcement officer to arrest a fleeing lawbreaker in another jurisdiction.[129]

The hot pursuit doctrine applies only when the officer forms the requisite probable cause to arrest and begins chase in his own jurisdiction, and then continues the chase until the suspect is stopped.[130] Due to the extraordinary measures involved and the potential safety risks, the doctrine only applies to felonies, and not to misdemeanors.[131] The pursuit must be "continuous and uninterrupted, but continuous surveillance of the suspect or uninterrupted knowledge of the suspect's whereabouts is not necessary."[132]

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127. **See** People v. Marino, 400 N.E.2d 491, 494 (Ill. App. Ct. 1980) (recognizing common law rule that officers have "no power to make warrantless arrests outside the territorial limits of the political entity which appointed them to their office" unless an exception exists, such as "fresh pursuit" or "citizen's arrest" authority); *Stevenson*, 413 A.2d at 1343; ***Slawek***, 338 N.W.2d at 122; *seegenerally* 6A C.J.S.*Arrest* § 53 (1975) ("An offense against the law is the justification for an arrest, and since the laws of one sovereignty have no extraterritorial operation, an offense against the laws of one state does not authorize an arrest therefor in another state.")

128. 5 AM. JUR. 2D *Arrest* § 72 (1995).

129. *Id.*

130. Molan v. Oklahoma, 614 P.2d 79, 80 (Okla. Crim. App. 1980) ("Fresh pursuit requires that an officer begin his chase in his or her own jurisdiction and continue it until the person is caught."); *see also* 5 AM JUR. 2D *Arrest* § 72 (1975). The doctrine does not apply where the offense occurred outside the officer's territorial jurisdiction. ***Id.*** Thus, if a military police gate guard witnessed a crime outside the installation gate, the hot pursuit doctrine would *not* justify giving chase. *See infra* Section IV.B, for a discussion of other legal bases to warrant a response in such a situation.

131. *See Stevenson*, 413 A.2d at 1343; *Wright*. 473 A.2d at 533; 5 AM. JUR. 2D *Arrest* § 72 (1995); 6A C.J.S.*Arrest* § 53 (1975).

132. 5 AM JUR. 2D *Arrest* § 72 (1995); *see also* Six Feathers v. Wyoming. 611 P.2d 857, 861 (Wyo. 1980) (defining hot pursuit as not "instant pursuit" but "pursuit without unreasonable delay").

Some states have enacted a statute permitting police officers from other states to enter the state when in hot pursuit of a fleeing felon and effect an arrest there.[133] Once the pursuing officer enters the state. he assumes the same powers of arrest as the officers of that state.[134] Nevertheless, even if a state has not enacted such a statute, the common law doctrine will still apply.[135]

The common law hot pursuit doctrine is applicable to military law enforcement officials who pursue lawbreakers off the military installation. On the installation, they have the power to arrest civilians, based on the inherent authority of the installation commander.[136] Under the hot pursuit doctrine, their authority may be transferred off the installation when they are directly pursuing a criminal. Once they are outside the installation, they assume at least the same authority possessed by local police.

3. Practical Consiclerations

To lawfully conduct a hot pursuit, military law enforcement officials must limit their pursuits to only those crimes that are felonious. Most obvious are violent crimes, such as an aggravated assault or robbery. Military law enforcement officials must be trained to recognize those offenses that warrant pursuit.[137] Additionally, installation law enforcement departments should establish clear guidelines that clarify when a pursuit is authorized and how to conduct it (for example, rules of engagement, to include deadly force).[138]

Another worthy consideration is to establish a memorandum of understanding between the military law enforcement department and the

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133. ***See,*** *e.g.*, MD. CODE ANN., FRESH PURSUIT, art 27. § 595 (1996) (providing that peace officers of another state may, when in "fresh pursuit" of a fleeing felon, effect the felon's arrest in Maryland to the same extent as a Maryland police officer).

134. ***See,*** *e.g.*, ***id.***

135. Commonwealth v. Gullick, 435 N.E.2d 348. 351 (Mass. 1982); Wright v. State. 473 A.2d 530 (Md. Ct. Spec. App. 1984).

136. ***See*** *supra* Section III.A.

137. ***See,*** *e.g.*, U.S. DEP'T OF ARMY. FIELD MANUAL 19-10, LAW ENFORCEMENT OPERATIONS, 110 (30 Sept. 1987) [hereinafter FM 19-10] ("MP policy specifies types of offenses that justify a high speed pursuit. Pursuit of an armed robbery suspect is normally warranted. The dangerous pursuit of traffic violators is much less justified."). At the U.S. Army Military Police School, new recruits are taught to conduct off-post hot pursuits only "when public safety is at great risk." Telephone Interview with Major James W. Smith. Instructor, Law Division. U S. **Army** Military Police School (Jan. 26. 1999).

local authorities. Such an agreement could define those circumstances that will warrant an off-post pursuit, create communication channels to effect immediate reporting of a hot pursuit to local authorities, and establish procedures to minimize risk to the local populace. The agreement should also address the use of force and other extraordinary measures, such as roadblocks.

Obviously, when military law enforcement officials engage in a high-speed off-post pursuit, the risk of liability for the United States is high. To minimize the liability risks, officials must be trained to balance the need to apprehend the suspect (for example, will the suspect cause serious injury to others if he escapes?) against the risk of endangering the community by the chase itself. Once the decision to pursue is made, the official must know his capabilities and limits. At some point, the chase may become too risky, and the official must "back off." Finally, during the chase, the military law enforcement department headquarters must maintain radio communication with the pursuing official and, most importantly, ultimate control and authority to end the pursuit.

B. Response to an Off-Post Emergency[139]

This section reviews the authority of a military law enforcement official to respond to an off-post crime that is in progress. The official may personally observe the crime or be summoned for assistance. In either case, the crime is occurring outside the official's territorial jurisdiction. In this scenario, the two legal bases discussed above are inapplicable. The security of the installation is probably unaffected, so the commander's inherent authority to maintain law and order cannot be extended to warrant the off-post response. Moreover, without an independent military purpose,

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138. ***See,*** *e.g.*, Fort Knox Provost Marshal, Standard Operating Procedures, Emergency Vehicle Operation–Hot Pursuit (on tile with author).

> Hot pursuit is justified only when the MP knows or has reasonable grounds to believe the suspect presents a clear and immediate threat to the safety of other motorists; has committed or is attempting to commit a serious felony; or when the necessity of immediate apprehension outweighs the level of danger created by the hot pursuit.

Id. At the US. Army Military Police School, newly appointed Army installation provost marshals are encouraged to establish this type of standard operating procedures for their departments. Telephone Interview with Lieutenant Colonel Stephen R. Haney. Law Division, U.S. Army Military Police School (Feb. **4,** 1999).

the Military Purpose Doctrine will not protect the official from a potential Posse Comitatus Act violation.'" In addition, the crime has occurred outside of the official's jurisdiction, and the hot pursuit doctrine only applies when the original crime occurs on post.[141]

This section concludes that the only legitimate legal justification for a response in this scenario is the common law doctrine of "citizen's arrest."[142] Several state courts have held that, where a police officer, who is outside of his territorial jurisdiction, observes or is summoned to stop a crime in progress, he may respond in the same manner that a citizen of that state may respond.[143] Thus, the fact that the officer lacks his official authority outside his jurisdiction will not invalidate the arrest.[144]

This section first studies the law of citizen's arrest and how it applies to the military law enforcement official. Next, the theory is tested against the Posse Comitatus Act to determine whether a violation may occur during an off-post response. Then, this section addresses potential criticisms of this theory; for example, liability issues will be explored to determine whether a responding official will **risk** personal liability. Finally, the sec-

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139. Reference to the off-post "emergency" should not be confused with the generally accepted constitutional exception to the Posse Comitatus Act, "Emergency Powers." This constitutional exception authorizes "prompt and vigorous [federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden . . . civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions," and local and state authorities are unable to respond adequately. Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. § 215.4c(1)(i) (1998). This exception applies only in extraordinary circumstances. Some examples include: "sudden and unexpected invasions or civil disturbances, including civil disturbances incident to earthquake, fire, flood. or other public calamity endangering life or federal property or disrupting federal functions or the normal processes of government." **JA 221**, *supra* note 13, para. 3-9. Furthermore, federal forces may not respond unless "duly constituted local authorities are unable to control the situation." AR 500-51, *supra* note *36*, para. 3-4b(1).

140. *But* see DOD DIR. 5525.5. *supra* note 14, encl. **4,** para. 1.2.1 (providing that actions taken for the "protection of DOD personnel" are permissible direct actions–within the scope of the Military Purpose Doctrine–that do *not* violate the Posse Comitatus Act).

Thus, if a military official responded to an attack on a service member, the independent military purpose avoids a violation of the Act. However, while this provision of the DOD Directive describes an *exception* to the Posse Comitatus Act. it does not provide a legal basis to conduct an arrest. In other words, the military official must have some legal basis, such as citizen's arrest authority, to conduct the arrest. The Military Purpose Doctrine is then applied only to permit what might otherwise be a violation of the Act.

141. See ***supra*** Section IV.A.

cion examines one potentially problematic form of off-post activity: responding to incidents occurring in off-post military housing areas.

1. The Citizen's Arrest

As noted earlier,[145] a law enforcement officer acting outside of his territorial jurisdiction acts beyond his official capacity and thus has no *official* power to arrest.[146] The officer does, however, possess any rights that are bestowed upon the citizens of that state, including the right to make a citizen's arrest. Each state authorizes its citizens to make some form of arrest,[147] whether by statute[148] or by common law.[149] While each state may differ as to the extent of a citizen's arrest authority, the common approach is to empower the citizen to arrest without a warrant for felonies

142. There is one other legal basis, related to the commander's inherent authority, that may warrant an off-post response in a specific type of circumstance. If the crime involves the theft or destruction of government property, military officials may respond and assert police power pursuant to the commander's inherent authority to protect federal property. See Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. § 215.4c(1)(ii) (authorizing "federal action, including the use of military forces, to protect federal property . . . when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection").

Thus, if a military law enforcement official observes a civilian vandalizing a government vehicle outside the installation gates, and the local civil authorities are unable to respond, the official may travel off post and arrest the civilian. Furthermore, such action would be excepted from the Posse Comitatus Act as a legitimate military purpose. See DOD DIR. 5525.5, ***supra*** note 14, encl. **4,** para. 1.2.1.5 (providing that "protection of DOD equipment is "permissible direct assistance"). This authority is limited, however, to the protection of government property, and will not apply in the typical off-post crime in progress.

143. See, *e.g.*, State v. Stevens, 603 A.2d 1203, 1206-07 (Conn. App. Ct. 1991) (listing and approving several cases where officers making warrantless arrests outside their jurisdictions were held to have lawfully acted with the authority of private citizens).

144. State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa 1973) ("When the [Nebraska] officers came to Iowa, they ceased to be officers but they did not cease to be persons. 'An officer who seeks to make an arrest without warrant outside his territory must be treated as a private person."').

145. ***See supra*** Section IV.A.2.

146. See People v. Marino, 400 N.E.2d 491, 494 (Ill. App. Ct. 1980) (recognizing common law rule that officers have "no power to make warrantless arrests outside the territorial limits of the political entity which appointed them to their office" unless an exception exists, such as "fresh pursuit" or "citizen's arrest" authority); Stevenson v. State, 413 A.2d 1340, 1343 (Md. 1980); State v. Slawek, 338 N.W.2d 120, 122 (Wisc. App. 1983); 6A C.J.S. ***Arrest*** § 53 (1975) ("An offense against the law is the justification for an arrest, and since the laws of one sovereignty have no extra-territorial operation, an offense against the laws of one state does not authorize an arrest therefor in another state.").

and misdemeanor breaches of the peace committed in his presence, and on probable cause for felonies that are committed outside his presence.[150]

Several courts have held that, when a police officer makes an arrest outside of his territorial jurisdiction, he acts as a private citizen, and the arrest will be deemed valid if made in accordance with the law of citizen's arrests for that jurisdiction.[151] In *Stevenson v. State*,[152] the Maryland Court of Appeals reviewed a case in which two Washington, D.C., police detectives were in Maryland on routine business when they observed a bank robbery in progress. They immediately responded by chasing two suspects for several city blocks, finally subduing them. At trial, the defendants unsuccessfully moved to suppress all evidence seized as fruit of an illegal arrest.[153] Finding that the officers were without statutory authority to arrest–as police officers–in Maryland, the court reviewed the common law of citizen's arrests in Maryland and held that the arrests were proper.[154]

When police officers conduct extraterritorial arrests under the auspices of citizen's arrest power, they nevertheless must comply with the Fourth Amendment protections against unreasonable searches and seizures. Normally, a private citizen's actions do not trigger the protections

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147. It is generally accepted that the validity of an arrest is determined by the law of the state where the arrest was made. United States v. Di Re. 332 U.S. 581. 589 (1948); Williams v. Adams. 436 F.9d 30. 32 (2d Cir. 1970).

148. ***See,*** *e.g.*, GA. CODE ANN. § 17-4-60 (1997) **("A** private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape. a private person may arrest him upon reasonable and probable grounds of suspicion.").

149. In Maryland. for example, the Court of Appeals has set forth the common law requirements as follows:

> In Maryland, a private person has authority to arrest without a warrant only when (a) there is a felony being committed in his presence or when a felony in fact has been committed whether or not in his presence. and the arrester has reasonable ground (probable cause) to believe the person he arrests has committed it, or (b) a misdemeanor is being committed in the presence or view of the arrester which amounts to a breach of the peace

Stevenson v. State, 413 A.2d 1340. 1345 (Md. 1980).

150. ***See*** *Stevenson*, 413 A.2d at 1345 (stating that this is the law on citizen arrests "generally accepted both in this country and in England since at least the late eighteenth century"); 5 AM. JUR. 2D *Arrest* § 55 (1995) ("[T]he common law accorded a private person extensive powers to arrest without warrant for felonies and breaches of the peace committed in his or her presence, and on probable cause for past felonies.").

of the Fourth Amendment, since constitutional protections only apply to the actions of governmental officials.[155] When, however, the private person "in light of all the circumstances of the case must be regarded as having acted as an 'instrument' or agent of the state," the Fourth Amendment will govern his actions.[156] Thus, although an officer is no longer "cloaked with the official authority of a police officer" when he leaves his jurisdiction, it would "be disingenuous to think that [the officer is] not acting as an agent or instrumentality of the police simply because he crossed the state line."[157] Thus, if an out-of-state police officer conducts a citizen's arrest in an illegal manner, such as an arrest based on insufficient probable cause, the exclusionary rule will apply.

On the other hand, just because the police officer is arresting based on a citizen's arrest theory does not mean he must "surrender the indicia of his authority" (such as his uniform, weapon, and badge) before making an arrest.[158] Thus, the officer may pursue a suspect in his police vehicle, and

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151. *See, e.g.*, United States v. DeCatur, 430 F.2d 365, 367 (9th Cir. 1970) (holding that a U.S. postal inspector had authority under California citizen arrest statute to effect a citizen arrest of a mail theft suspect, even though the postal inspector did not possess statutory arrest authority): State v. Stevens, 603 A.2d 1203, 1208 (Conn. App. Ct. 1991) (holding that police officers acting outside their territorial jurisdictions have the same authority to arrest as do private citizens); People v. Marino, 400 N.E.2d 491, 494 (Ill. App. Ct. 1980).

> [O]ur own research has disclosed an extensive line of cases from other states which uphold the validity of an extra-territorial arrest made by a police officer who lacked the official authority to arrest. where it is determined that a private person, acting in the same circumstances, would have been authorized by law to make a "citizen's arrest.

Id. Commonwealth v. Gullick. 435 N.E.2d 348, 351 (Mass. 1982) (holding that police officer effecting arrest outside jurisdiction does so as a private citizen and that such arrest is valid as a citizen's arrest); State v. Slawek, 338 N.W.2d 120. 121 (Wis. Ct. App. 1983) (holding that police officer acting beyond his bailiwick has no power to effect arrests. but that extensive line of authorities from several states validate an extraterritorial arrest as that of a private citizen if the state sanctions citizen arrests).

152. 413 A.2d 1340 (Md. 1980).

153. *Id.* at 1343.

154. *Id.* at 1344.

155. State v. Stevens. 603 A.2d 1203, 1208 (Conn. App. Ct. 1991) (citing United States v. Jacobsen. 466 U.S. 109, 113 (1984)).

156. Coolidge v. New Hampshire, 430 U.S. 443. 488 (1971). *quoted* in *Stevens*, 603 A.2d at 1208; ***see*** Commonwealth v. Gullick, 435 N.E.2d 348. 351 n.3 (Mass. 1982) ("Although the Fourth Amendment does not apply to private citizens, it applies in a case such as this, where the arresting citizen is acting as an agent or instrumentality of the police.").

he may show his badge or draw his weapon to effect the arrest. In *People v. Marino*,[159] the Appellate Court of Illinois upheld an arrest where Chicago police formed probable cause to arrest a suspect while they were conducting an investigation outside their territory. The officers asserted their "official authority," which was inapplicable outside their jurisdiction, to effect the arrest. The court held: **"[A]** warrantless arrest effected by a police officer who asserts official authority to arrest which he does not in fact have is nevertheless valid if an arrest made by a private person under the same circumstances would have been valid."[160]

Like other law enforcement officials, military officials have the legal authority to depart their installations and conduct citizen arrests.[161] Thus, the citizen's arrest authority provides the legal basis to respond to the "emergency response" scenario presented at the start of this section.[162] **As** long as the off-post criminal act is a felony or, in most states, a misdemeanor breach of the peace, the military official who observes it, or is requested to assist in preventing it, may respond. Based on the citizen's arrest theory, and assuming probable cause exists, the resultant arrest will be legal. Furthermore, when a response is legally warranted, the official may depart the federal jurisdiction and carry with him the necessary means available to effect the arrest, such as his uniform, badge, weapon. and squad car.

As a matter of policy, commanders will not want the "citizen's arrest" authority to serve as a ticket for military law enforcement officials to start asserting their power off post. The authority may be used only in extraor-

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157. *Stevens*, 603 A.2d at 1208. ***See*** M. BASSIOUNI, CITIZEN'S ARREST 33-33 (1977):

> If the [extraterritorial] arrest [by a government agent] was in violation of search and seizure standards, its results would be subject to the exclusionary rule, but if the arrest was valid then its consequences would be admissible. However, a governmental agent cannot operate outside his or her jurisdiction and benefit from a lesser legal threshold, seizing evidence by means of a search incidental to arrest which would not withstand constitutional scrutiny. Any contrary position would in fact restore the "silver platter doctrine." which at one time enabled federal and state officers to operate outside their jurisdictional authority and to avoid constitutional limitations on admissible evidence.

158. Phoenix v. State. 428 So. 2d 262, 266 (Fla. Dist. Ct. App. 1982). *aff'd*. 455 So. 2d 1024 (Fla. 1984).

159. 400 N.E.2d 491 (Ill. App. Ct. 1980).

160. *Id.* at 497.

dinary circumstances, when civilian authorities are unavailable. The execution must, of course, be in accordance with applicable state law; this mandates that military law enforcement officials are trained in the citizen's arrest laws of the surrounding state. Furthermore, the abuse of "citizen's arrest" authority risks "pervading" the activities of civil law enforcement and may violate the Posse Comitatus Act. The next subsection, therefore, tests the citizen's arrest against the Posse Comitatus Act.

2. *The Citizen's Arrest and the Posse Comitatus Act*

This subsection analyzes whether or not a citizen's arrest that is conducted by a military law enforcement official will violate the Posse Comitatus Act. When military authorities respond to an off-post crime in

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161. In a recent case, the Fifth Circuit Court of Appeals applied "citizen's arrest" authority to uphold an *on-post* arrest at Fort Hood, Texas. United States v. Mullin, No. 97-50904, 1999 U.S. App. LEXIS 12092, at *8 (5th Cir. June 10, 1999). The court held that, although military police were not "peace officers" under Texas law, they still possessed all the arrest powers of a "private citizen." *Id.* Furthermore, military police conducting a "citizen's arrest" could lawfully interrogate the suspect and conduct a search incident to the arrest. *Id.* at *14-*16. The court did not specifically limit its analysis to on-post arrests. The *Mullin* holding would certainly apply off the installation, where military law enforcement officials have, as a minimum, the arrests powers of a private citizen.

The authority of military law enforcement officials to conduct citizen arrests is acknowledged in several forms. ***See,*** *e.g.*, Aid to Civil Authorities and Public Relations, Apprehension and Restraint, 32 C.F.R. § 503.1 (1998):

> All members of the Department of the Army having [sic] the ordinary right and duty of citizens in the maintenance of the peace. Where, therefore, a felony or a misdemeanor amounting to a breach of the peace is being committed in his presence, it is the right and duty of every member of the military service, as of every civilian, to apprehend the perpetrator.

See also AR 195-2, ***supra*** note 26, para. 3-21 ("Nothing in this regulation is intended to restrict. . . the personal authority of special agents under various state laws concerning citizen arrests."); FM 19-10, ***supra*** note 134. at 108:

> All members of the military have the ordinary right of private citizens to assist in maintenance of the peace. This includes the right to apprehend offenders. Citizen's arrest power is defined by local law. In exercising this power, care should be taken not to exceed the right granted by law.

162. The citizen's arrest authority also provides a legal basis for conducting an arrest when in "hot pursuit" of a civilian who committed an offense on post. ***See supra*** note 110 (discussing the overlap of this theory with the common law doctrine of extraterritorial arrest authority when in hot pursuit).

progress, the independent military purpose of protecting the installation–a principle exception to the Act[163]–is not existent.[164] Courts have. however, found other factors to validate the law enforcement activities of military officials. Courts have generally held that, where the involvement does not "constitute the exercise of regulatory, proscriptive, or compulsory military power," does not amount to "direct active involvement in the execution of the laws," and does not "pervade the activities of civil authorities,"[165] no violation will be found.

Normally, no violation occurs when military personnel enforce civil laws on their own initiative as private citizens.'"[166] When. however, the private person "in light of all the circumstances of the case must be regarded as having acted as an 'instrument' or agent of the military,"[167] a court is unlikely to find that the action taken cannot be attributed to the military. Thus, although the "citizen's arrest" doctrine is applied to legalize the extraterritorial arrest itself for purposes of the Fourth Amendment, the

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163. *See supra* Section III (describing the Military Purpose Doctrine as an exception to the Posse Comitatus Act). ***See,*** *e.g.*, Hayes v. Hawes. 921 F.2d 100.103 (7th Cir. 1990); Harker v. State. 663 P.2d 932. 936 (Alaska 1983).

164. In certain specific circumstances, however, the Military Purpose Doctrine will apply. First. *DOD Directive* 5525.5 provides that actions taken for the "protection of DOD personnel" are permissible direct actions–within the scope of the Military Purpose Doctrine–that do *not* violate the Posse Comitatus Act. DOD DIR. 5525.5. *supra* note 14, encl. 4, para. 1.2.1. Thus. if a military official responded to an attack on a service member. the independent military purpose avoids a violation of the Act. This article. however. will assume that the victim is a civilian or–*more* likely–that the military official cannot determine the status of the victim.

Second, if the crime involves the theft or destruction of government property, a military law enforcement official may lawfully respond. *DOD Directive* 5525.5 provides that "protection of DOD equipment" is a permissible direct action that does not violate the Act. DOD DIR. 5525.5. *supra* note **14.** encl. **4,** para. 1.2.1.5. Thus, if an official observes a civilian vandalizing a government vehicle outside the installation gates. and the local civil authorities are unable to respond, the official may travel off post and arrest the civilian. This authority is limited. however, to the protection of government property. and will not apply in the typical off-post crime in progress.

165. United States v. Yunis. 924 F.2d 1086. 1094 (D.C.Cir. 1991) [setting out the three established tests to determine when military involvement constitutes more than just indirect assistance); see *also* United States v. Kahn, 35 F.3d 426. 431 (9th Cir. 1994); United States v. Hartley. 678 F.2d 961. 978 n.24 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

166. Major Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83. 126 (1975) ("It is not sufficient that military personnel be 'volunteers.' they must clearly be acting on their own initiative and in a purely unofficial and individual capacity."); ***see*** *generally* Porto. *srrpra* note 14, at 298-99 (listing and summarizing cases where military personnel were held to have been assisting civil authorities on their own initiative. as private citizens).

doctrine does not necessarily excuse such action under the Posse Comitatus Act when the military official retains his status as an *instrumentality of the military.*

Nevertheless, both federal and state courts have held that, when military law enforcement officials assume no greater authority than would a private citizen assisting civil law enforcers, no violation will be found. Common cases are when military investigators act as undercover agents in off-post drug trafficking investigations.[168] In other words, when a military official's actions are "like" those of a private citizen's-even though he or she is performing normal law enforcement duties–the Posse Comitatus Act will not be violated. Thus, when a military official immediately responds to an off-post criminal incident to which civil authorities are unable to assist, he is doing no more than a private citizen would be authorized to do.

A citizen's arrest is unlikely to "pervade" the activities of civil law enforcement officials.[169] Such responses will be infrequent, isolated events. In the typical case, the military will assist only when civil authorities have not yet responded–and the emergency circumstances necessitate quick action. Only where the military's actions equate to excessive intervention in the activities of civil authorities will a Posse Comitatus Act violation be found.[170] For example, if military law enforcement officials, relying on "citizen's arrest" authority, began to patrol the adjacent areas off the installation and search out criminal activity, this pervasion of civil authority would violate the Act.

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167. Coolidge v. New Hampshire. 430 **U.S.** 443, 488 (1971). *quoted in* State v. Stevens, 603 A.2d 1203, 1208 (Conn. App. Ct. 1991); ***see also*** Commonwealth v. Gullick. 435 N.E.2d 348, 351 n.3 (Mass. 1982) ("Although the Fourth Amendment does not apply to private citizens. it applies in a case such as this, where the arresting citizen is acting as an agent or instrumentality of the police.").

168. ***See, e.g.***, Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990) (finding no violation where Navy investigator's involvement in a drug investigation was minimal and served the same function as a civilian cooperating with the police).

169. Ensuring military law enforcement officials do not "pervade" the activities of civil authorities is essential to avoiding a Posse Comitatus Act violation. See, ***e.g.***, United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988) (concluding that, because military participation in drug investigation "did not pervade the activities of civilian officials, and did not subject citizenry to the regulatory exercise of military power," it did not violate the Act).

170. ***See, e.g.***, Taylor v. State, 645 P.2d 522 (Okla. Crim. 1982) (finding that military involvement was excessive and thus violated the Posse Comitatus Act when military investigator actively participated in a drug investigation and subsequently arrested the suspect "not as a private citizen, but instead. . . solely under the authority of his military status").

Courts also look to whether the military officials acted on their own initiative, or whether their actions were intended primarily to aid civil authorities. Two courts have found violations of the Act when the military acted *in response to specific requests* for assistance by civil authorities.'" In these cases, the states received more than incidental benefits—in fact, they were employing the power of the military to enforce civil laws, a clear violation of the Act. Such is not the case when civil authorities are unavailable, and a military official provides immediate response, on his own initiative, to an off-post criminal incident.

Finally, the Act itself requires "willful" employment of the military to enforce the law."' This language necessarily implies planned action, where civil or military officials make a conscious determination to use military power *in the place of or in assistance to* civil law enforcement. The immediate response to an off-post criminal emergency can clearly be distinguished from the "willful" use of military investigators to deliberately plan and effect a law enforcement operation, such as an off-post drug bust.

In sum, it appears that military law enforcement officials will not risk violating the Posse Comitatus Act when responding, in the form of a "citizen's arrest," to an off-post crime in progress.

3. Criticisms of the Citizen's Arrest Approach

This subsection addresses some of the criticisms that have been or will be asserted against the "citizen's arrest" approach to off-post law enforcement action.

a. Unreasonable to Expect Military Law Enforcers to Understand Citizen's Arrest Laws

Some commentators are skeptical of reliance on the citizen's arrest theory on the basis that military law enforcement officials, who are transferred from one installation to another, cannot be expected to learn the citizen's arrest rules of each state in which they are assigned.[173] Since the

171. ***See supra*** note 120; ***see*** *also* Harker v. State, 663 P.2d 932, 937 (Alaska 1983) (reviewing all cases where Posse Comitatus violations were found and stating that, in *all* cases finding a violation of the Act, "the military conduct was at the request of civilian law enforcement").

172. 18 U.S.C.A. § 1385 (West 1998).

law of arrest is determined by the state where the arrest takes place,[174] each state is likely to have a different rule, and would, according to these commentators, place an unreasonable burden on military law enforcement officials if expected to act pursuant to various states' citizen's arrest provisions.[175] The risk is that an official will be confused and exceed the citizen's arrest authority for the particular state.[176]

There is some validity to this criticism. In the Fifth Circuit case of ***Alexander v. United States***,[177] for example, a U.S. postal inspector's "citizen's arrest" was held illegal because the inspector did not comply with the Texas requirement of immediate removal of the suspect to a magistrate or peace officer.[178] All evidence seized incident to the arrest was thus suppressed pursuant to the exclusionary rule.[179]

While the actions of a private citizen normally do not implicate the protections of the Fourth Amendment, the actions of a law enforcement official outside his jurisdiction-even though conducting a citizen's arrest-generally must comply with such protections.[180] The risk is real, therefore, that a military law enforcement official will exceed the limits or fail to

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173. ***See, e.g.***, Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984):

> Given that we have installations in many states and those states often have different and confusing laws relating to "citizen's arrests," we place an unreasonable burden on military police who are transferred from one installation to another, if we expect them to act pursuant to each state's "citizen's arrest" authority . . . . [W]e should cease publishing official reliance on any such authority . . . .

See also Captain Darrell L. Peck, ***The Use of Force to Protect Government Property***, 26 MIL. L. REV. 81, 118-19 (1964).

174. It is generally accepted that the validity of an arrest is determined by the law of the state where the arrest was made. United States v. Di Re, 332 U.S. 581, 589 (1948); Williams v. Adams, 436 F.2d 30, 32 (2d Cir. 1970).

175. ***See*** Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984).

176. *Id.*

177. 390 F.2d 101 (5th Cir. 1968).

178. *Id.* at 106-07. The facts in ***Alexander,*** however, warrant special scrutiny. In ***Alexander,*** the inspectors misled the suspect as to the purpose of the investigation when questioning him and gaining his consent to search. ***Id.*** at 107. The Court expressed concern regarding "detention, interrogation, and trickery by every self-appointed detective." ***Id.*** at 109.

179. *Id.* at 108.

meet the minimum requirements of a citizen's arrest statute, thus rendering the arrest illegal.

The obvious response to this criticism is that there is no other option. In the context of an emergency response to an off-post incident,[181] other than citizen's arrest authority, military officials have no statutory or common law authority to conduct arrests of civilians outside the federal installation's jurisdiction.[182] Unless the Department of Defense is prepared to specifically prohibit military law enforcement officials from engaging in such arrests, these officials must be expected to know the rules.[183] For the time being, at least, the Army's policy encourages the execution of citizen's arrests, declaring it the "duty" of every service member, as a citizen, to apprehend perpetrators who commit felonies or misdemeanors amounting to breaches of the peace."[184] Furthermore, military law enforcement officials are already expected, in accordance with regulations and training manuals, to understand the local rules on citizen's arrest.[185]

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180. See ***sirpra*** Section IV.B.1 (describing how law enforcement officials acting outside their territories must still comply with the Fourth Amendment. since they remain agents of the Government).

181. This statement pertains only in the context of the emergency response to a crime in progress. As described in Section IV.A.2. ***sirpra,*** there is a separate, common law basis for pursuing a lawbreaker off post in hot pursuit.

182. As previously noted, there may exist legal bases to act in such specific circumstances as when the victim of the crime is a service member, see ***supra*** notes 137. 161: or when the object of the crime is government property. ***see sirpru*** notes 138, 161.

183. Although the laws of various states may differ. they will generally follow the common law rule, with minor alterations. It is hard to imagine that the task of learning the local state's rules upon each reassignment would be an unreasonable burden. If we can expect military law enforcement officials to understand the rules of search and seizure. certainly we can expect them to learn the rules of citizen's arrest. Furthermore. because of the Assimilated Crimes Act (18 U.S.C.§ 13), which assimilates state criminal laws into the United States Code on installations with exclusive federal jurisdiction, law enforcement officials must be familiar with numerous state criminal laws, including all the relevant state traffic laws. upon each assignment to an exclusive jurisdiction federal installation.

184. Aid to Civil Authorities and Public Relations, Apprehension and Restraint, 32 C.F.R. § 503.1 (1998):

> All members of the Department of the Army having [sic] the ordinary right and duty of citizens in the maintenance of the peace. Where. therefore. a felony or a misdemeanor amounting to a breach of the peace is being committed in his presence. it is the right and duty of every member of the military service, as of every civilian, to apprehend the perpetrator.

b. A Professional Law Enforcement Official Cannot Conduct a "Citizen's" Arrest

Some commentators claim that the citizen's arrest doctrine loses applicability when the citizen is a military law enforcement official performing his trained profession.[186] Thus, on the one hand, a service member who is off duty and acting as a private citizen may come across a crime in progress and exert citizen's arrest authority to arrest the offender. In this case, the soldier's military status is incidental to his being at the scene of the crime. On the other hand, when a military investigator responds to the scene, his military status is not incidental to his presence at the scene. Rather, it is the very reason he is called there; he carries his official military status with him. Thus, it is illogical that he can claim "citizen's arrest" authority.

This argument apparently confuses the application of "citizen's arrest" in the criminal procedure context with "citizen's arrest" in the context of tort law, specifically the agency relationship of master-servant. The purpose of asserting the citizen's arrest authority in a response to an off-post crime in progress is to comply with Fourth Amendment protections against unreasonable seizures; without statutory or other legal authority, the only *lawful* arrest will be one pursuant to the state's rule for citizen's arrests. But, in fact, the official never severs his relationship with the sovereign that appointed him. Several courts have held that, while a police officer who is outside of his territorial jurisdiction may lawfully conduct an arrest pursuant to the local state's citizen's arrest law, the officer still retains his status as an agent of the government.[187] In other words, the

185. See, *e.g.*, AR 195-2, *supra* note 26. para. 3-21 ("Nothing in this regulation is intended to restrict. . . the personal authority of special agents under various state laws concerning citizen arrests.");FM 19-10. ***supra*** note 134, at 108 ("All members of the military have the ordinary right of private citizens to assist in maintenance of the peace. This includes the right to apprehend offenders. Citizen's arrest power is defined by local law. In exercising this power, care should be taken not to exceed the right granted by law.").

186. ***See,*** *e.g.*, Military Detention of Civilians for Certain Offenses Committed Within an Air Force Installation. Op. JAG, Air Force, No. 60 (3 Oct. 1991) ("Because Air Force Security Police act within their official capacity while performing their assigned duties. they may not make a so-called 'citizen's arrest' during the time they are performing official duties.").

187. Coolidge v. New Hampshire. 430 U.S. 443,488 (1971). *quoted in* State v. Stevens, 603 A.2d 1203, 1208 (Conn. App. Ct. 1991); ***see*** Commonwealth v. Gullick, 435 N.E.2d 348,351 n.3 (Mass. 1982) ("Although the Fourth Amendment does not apply to private citizens, it applies in a case such as this, where the arresting citizen is acting as an agent or instrumentality of the police.").

officer can be on official business, as an instrument of the state, and *still conduct* a *citizen's arrest.* To hold otherwise would necessitate that the officer shed himself of all indicia of his official position–squad car, uniform, badge, handcuffs, and weapon–and go "off-duty,''before conducting an arrest. Courts have generally refused to adopt this argument.

Those who claim an "official cannot act as a citizen" are looking through the lens of "servant-master" rules, a concept that is applicable in tort law. Their point, apparently, is that an officer cannot temporarily sever his agency relationship to effect an arrest as a "citizen" when his involvement in the arrest is based on his agency relationship in the first place. Advocates of the citizen's arrest theory, however, acknowledge this inability to sever the agency relationshipthey recognize that the officer remains an instrument of the state–but the official relationship does not negate reliance on the "citizen's arrest" authority to effect a lawful arrest outside the military installation.

c. Military Law Enforcement Officials will be Exposed to Personal Liability

Another criticism of the citizen's arrest theory is that it may expose individual military law enforcement officials to personal tort liability if they exceed the permissible limits of a citizen's arrest statute.[188] Under the Federal Tort Claims Act, when an official's conduct causes injury, such as a false arrest, the United States waives sovereign immunity as long as the official was acting "within the scope of his employment" at the time."' Critics of the citizen's arrest theory warn that such conduct is outside the

188. ***See,*** *e.g.*. Peck. *supra* note 170, at 118-19.

189. 28 U.S.C.A. § 1346(b) (West 1998). The Act generally prohibits suits for damages caused by intentional torts, such as assault and battery and false arrest. *Id.* $ 2680. Congress has. however. provided an exception: The Federal Tort Claims Act (FTCA) waives sovereign immunity for assault. battery. false imprisonment. and false arrest when committed by federal law enforcement officers. The "federal law enforcement officer" is defined as an officer of the United States "who is empowered by law to execute searches. to seize evidence, and to make arrests for violation of [flederal law." *Id.* § 2680(h). The federal official must have been acting within the scope of his employment. For purposes of the FTCA. military law enforcement officials have been held to be "federal law enforcement officers." See Kennedy v. United States, 585 F. Supp. 1119. 1123 (D.S.C. 1984) (involving a claim of false arrest under the FTCA. where the court held: "Military police are law enforcement officers who possess power to make arrests for violations of Federal law. While they normally confine their activities to enforcement of military law, they do possess all powers that civilian law enforcement officers have. ***on*** military property.").

scope of normal duties and may even violate the Posse Comitatus Act; thus, the conduct will be considered outside the scope of employment. These officials would therefore not be entitled to protection by the United States against a claim, and may be exposed to personal tort liability for their actions.

One case that lends weight to this argument is *Wrynn v. United States*,[190] where an Air Force helicopter pilot, while assisting a sheriff in searching for an escaped prisoner, struck a tree and injured some bystanders. In a suit based on the Federal Torts Claims Act, the court held that the pilot had violated the Posse Comitatus Act by assisting civilian law enforcement, and was thus acting outside the scope of his employment.[191] The United States could therefore not be held liable. With the government's sovereignty not waived, the injured party's only redress would be against the pilot and crewmembers in their private capacities.

The *Wrynn* case, however, is inapplicable where a military law enforcement official responds, on his own initiative, to an off-post crime in progress. In *Wrynn*, the local authorities *requested military assistance* in enforcing the law; a clear violation of the Posse Comitatus Act was thus found.[192] In the context of independently responding to an off-post crime in progress, however–when civil authorities are unavailable–there is no violation of the Act.[193]

Again, the criticism confuses the application of "citizen's arrest" in the criminal procedure context with "citizen's arrest" in the context of tort law, specifically the agency relationship of master-servant. When a military law enforcement official responds to an off-post crime in progress, the citizen's arrest doctrine legalizes the resulting arrest for Fourth Amendment purposes–but the official never severs his agency relationship with the military.[194] He will thus be found to have acted within the scope of his employment and will be protected from suit pursuant to the FTCA.[195] Furthermore, it would be disingenuous for the military departments to publish guidance essentially authorizing citizen's arrests[196] and then claim that a military law enforcement official exceeds his authority when he conducts

190. 200 F. Supp. 457 (E.D.N.Y. 1961).

191. ***Id.*** at 465.

192. *Id.*

193. ***See*** *supra* Section IV.B.2 (describing how courts have generally held that, when military law enforcement officials act on their own initiative and not at the request of civil authorities, no violation will be found).

194. ***See*** *supra* Section IV.B.3.b.

one. Only if a military department or local commander specifically prohibited employing citizen's arrest authority to respond to an emergency in progress would such conduct be outside the scope of employment.[197]

4. The Citizen's Arrest in an Off-Post Housing Area

This subsection examines the assertion of military law enforcement power in off-post housing areas. In these areas, the United States will likely have only a "proprietorial interest." This means that the federal government has acquired some right or title of ownership to the area, but has

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195. *See* RESTATEMENT (SECOND) OF AGENCY § 228 (1958):

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master. and
>
> (d) if force is intentionally used by the servant against another. the force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized. far beyond time or space limits. or too little actuated by a purpose to serve the master.

196. See, *e.g.*, Aid to Civil Authorities and Public Relations, Apprehension and Restraint, 32 C.F.R. § 503.1 (1998):

> All members of the Department of the Army having [sic] the ordinary right and duty of citizens in the maintenance of the peace Where. therefore. a felony or a misdemeanor amounting to a breach of the peace is being committed in his presence. it is the right and duty of every member of the military service. as of every civilian, to apprehend the perpetrator

Id. See *also* AR 195-2, *supra* note 26, para. 3-21 ("Nothing in this regulation is intended to restrict . . . the personal authority of special agents under various state laws concerning citizen arrests."); FM 19-10, *supra* note 134, at 108 ("All members of the military have the ordinary right of private citizens to assist in maintenance of the peace. This includes the right to apprehend offenders. Citizen's arrest power is defined by local law. In exercising this power. care should be taken not to exceed the right granted by law.").

197. Of course, the official cannot respond to *any* emergency. Responding to a phone call requesting assistance to stop a crime in progress 30 miles from the installation would obviously be outside the scope of employment. Again. this article is concerned with the scenario whereby the military official either observes the crime just outside the gate or is requested to respond to an incident in close proximity to the gate.

obtained no legislative authority.[198] With legislative authority, the federal government may enact legislation pertaining to the area, including criminal statutes.[199] Where the government holds only a proprietorial interest, it has essentially the same rights as any landowner.[200] The state retains primary civil and criminal jurisdiction and may exert police power over the area.[201] The authority of the nearby installation commander to provide security and enforce the law in these areas is, thus, superseded by state and local civilian authorities. The authority of military law enforcement officials, therefore, will be minimal.

The same general rules of citizen's arrest, as addressed above, will apply when responding to crimes in progress within off-post housing areas.[202] But application of this doctrine becomes much more complex in this context. Most significant is the temptation for commanders and law enforcement officials to be drawn into an enforcement role where they have no inherent authority.[203] The temptation is compounded when local authorities take a "hands off' approach to patrolling in an area that they view as the military's responsibility.[204]

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198. JA 221, ***supra*** note 13, para. 2-5.

199. *Id.*

200. *Id.*

201. *Id.*

202. As previously discussed, there is another legal basis—related to the commander's inherent authority—that may warrant an off-post response in a specific type of circumstance. If the crime involves the theft or destruction of government property, military officials may respond and assert police power pursuant to the commander's inherent authority to protect federal property. *See* Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. § 215.4c(1)(ii) (1998) (authorizing "federal action, including the use of military forces, to protect federal property . . . when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection").

Thus, if a military law enforcement official is notified that a civilian is in the process of vandalizing a government-owned building in an off-post housing area, and the local civil authorities are unable to respond, the official may travel off post and arrest the civilian. Furthermore, such action would be excepted from the Posse Comitatus Act as a legitimate military purpose.' ***See*** DOD DIR. 5525.5. ***supra*** note 14, at encl. 4, para. 1.2.1.5 (providing that "protection of DOD equipment is "permissible direct assistance"). This authority is limited, however, to when local authorities cannot or will not respond. In most cases involving damage to government property in an off-post area, civil authorities may likely respond just as quickly as the military authorities.

203. Telephone Interview with John J. Perryman, III, Special Agent, Office of the Inspector General. Department of Defense, Criminal and Investigative Police and Oversight Division (Jan. 19, 1999) (referring to informal surveys he has conducted, revealing the extensive amount of involvement military law enforcement officials have in off-post housing areas within the DOD).

204. *Id.*

Extensive involvement in law enforcement within these areas places the commander and his law enforcement officials at great risk of violating the Posse Comitatus Act. Several federal and state courts have held that. where the military "pervades the activities of civil authorities," a violation will be found.[205] Routine patrols and frequent actions to enforce the law in these areas may likely lead to violations of the Act.

Certainly, there is a military purpose involved in ensuring the security of off-post housing areas. But, as stated earlier in this article, the further removed from the federal installation, the lesser the military's interest, and the less pervasive the conduct of military law enforcement may be. For example, while military investigators may permissibly investigate off-post drug sources and act as undercover agents during sting operations, they may not take active part in the search or arrest of civilian suspects. The military's necessity is tempered by the fact that, in such operations, they have the time to coordinate in advance with civil authorities that have the prerogative to enforce the law in their jurisdictions.[206] In an off-post housing area, the Military Purpose Doctrine would permit routine patrols for the legitimate purposes of protecting property and ensuring the health, general safety, and welfare of the military inhabitants. Beyond that goal, however, the conduct of military law enforcement risks violating the Posse Comitatus Act.

In some circumstances, military law enforcement officials may exert their authority–including conducting an arrest–without risk of violating the Act. For example, if a military policeman lawfully on patrol in a housing area suddenly observes a man assaulting another person, he may immediately respond, subdue the attacker, and detain him long enough to transfer him to civil authorities. Of course, unless the attacker was a service member, his authority would be that of an ordinary citizen in the surrounding state.

One federal circuit case is particularly analogous to this scenario. In *Applewhite* v. *United States Air Force*,[207] the Tenth Circuit reviewed whether the civilian wife of an airman could sue for a breach of her constitutional rights when she was arrested by Air Force special investigators

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205. ***See*** *supra* Section IV.A.1; ***see*** *also* United States v. Hartley, 678 F.2d 961, 978 n.24 (11th Cir. 1982); United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (setting out the three established tests to determine when military involvement constitutes more than just indirect assistance); United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994).

206. ***See*** *supra* Section III.C.

207. 995 F.2d 997 (10th Cir. 1993).

during a sting of an off-post drug operation. The investigators had set up a "buy-bust'' operation, whereby any military personnel purchasing drugs were to be immediately arrested. No civil authorities were present, since the investigation focused only on military personnel. At some point in the operation, Airman Applewhite brought his wife along for a purchase of drugs. An arrest followed, during which a pat-down search of Mrs. Applewhite, conducted for safety purposes, revealed the presence of illegal drugs. The investigators arrested her, handcuffed her, and transported her back to their office on the Air Force base, where they proceeded to interrogate and partially strip-search her. Civil authorities were contacted, but declined to accept jurisdiction, so she was released.

In her lawsuit, Mrs. Applewhite alleged that the investigators had violated the Posse Comitatus Act.[208] The court acknowledged the Military Purpose Doctrine and held that the sting operation itself was lawful since there was an independent military purpose.[209] The court then held that, given the *lawful presence and conduct* of the investigators at the scene, their actions upon discovering the criminal conduct of Mrs. Applewhite did not constitute a "willful use of any part of the Air Force as a posse to execute civil laws, nor did military law enforcement officers go outside the confines of a military installation to arrest a civilian."[210] In other words, the military investigators had not intended to enforce civil laws against Mrs. Applewhite or any other civilian—they responded to this unexpected criminal act no differently than an ordinary citizen would be authorized to do. Finally, the court held that the investigators were not required to let her go just because she was a civilian—they could detain her for a reasonable period of time to conduct some investigation and to inquire as to whether civil authorities had an interest in the case.[211]

The holding in *Applewhite* applies to the situation where a military policeman, patrolling an off-post housing area, observes an assault in progress. Lawfully present at the scene in accordance with the Military Purpose Doctrine, his response to the sudden emergency is not a willful use of the military to enforce the law, nor is apprehension of the attacker the reason for his presence in the area.

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208. *Id.* **at 999.**
209. *Id.* **at 1001.**
210. *Id.*
211. *Id.*

Another challenge to military law enforcement involvement in off-post housing areas is the "under color of office" doctrine, which might invalidate an otherwise lawful citizen's arrest. Under this doctrine, when a law enforcement officer acts outside his jurisdiction–and thus, pursuant to the surrounding state's citizen's arrest law–he may not use the power of his office to "gather evidence or ferret out criminal activity not otherwise observable."[212] In other words, although the officer need not discard the "indicia of [his] position" when making an arrest–such as his uniform, badge, weapon, and handcuffs–he may not use his position to discover evidence of a crime to which an ordinary citizen would not be privy.[213] Any evidence obtained by the unlawful assertion of official authority will be suppressed."[214]

This doctrine poses a particular challenge to military law enforcement officials engaged in patrols of off-post housing areas. While the citizen's arrest authority, described earlier, may warrant a response when the official observes or is asked to respond to a crime in progress, the "under color of office" doctrine severely limits the authority to *investigate* possible criminal activity.[215] For example, if a bystander tells a patrolling military official that the civilian husband of a service member violently attacked his wife three hours earlier, the official may not use his authority as a military law enforcement official to gather evidence about the case and then arrest the man.[216] Rather, he must defer to the jurisdiction of civil authorities.

The temptation to exert a military law enforcement "presence" in off-post housing areas necessitates that commanders and provost marshals understand the parameters of military authority off post. While there is no prohibition against conducting patrols in these areas, such involvement

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212. State v. Phoenix, 428 So. 2d 262. 266 (Fla. App. 1982)("Pursuant to the color of law doctrine, police officers acting outside their jurisdiction but not in fresh pursuit may not utilize the power of their office to gather evidence or ferret out criminal activities.").

213. *Id.* ("When officers outside their jurisdiction have sufficient grounds to make a valid citizen's arrest, the law should not require them to discard the indicia of their position before chasing and arresting the fleeing felon.").

214. *Id.*

215. This should not be confused with the authority to investigate off-post crimes having an adverse impact *on* the installation–such as the investigation of a drug dealer who sells to soldiers. ***See supra*** Section III.C. (describing off-post investigatory authority). This section is concerned with crimes having a direct adverse impact only within the off-post housing area.

216. Thus, he may not "canvas" the neighborhood. knocking on doors and representing himself as **a** military policeman to obtain evidence. He may not use his position to gain access to restricted areas to gain evidence.

places military law enforcement officials in precarious positions, where their sense of duty and an inclination to "ferret out" criminal activity in these areas could violate the Posse Comitatus Act. To avoid violating the Act, installation law enforcement departments should establish clear guidelines on the authority of military officials to act. They should also establish clear support agreements with local law enforcement agencies to ensure that civilian authorities will respond when needed.

IV. Conclusion

The purpose of this article has been to examine the authority that military law enforcement officials may exercise over civilians both on and off the federal military installation. The primary focus has been to determine the legal bases permitting these officials to conduct warrantless arrests of civilian lawbreakers.

The laws of the United States strictly limit the role of the military in civil law enforcement. Not only has Congress not provided military law enforcement officials with statutory arrest authority over civilians, but it also has enacted the Posse Comitatus Act, a criminal prohibition against the use of military personnel to enforce civil laws. **As** this article demonstrates, however, the military inevitably must assert some law enforcement authority over civilians. As a minimum, military installation commanders have the responsibility to maintain law and order on their installations and to protect the occupants thereof. Without statutory arrest authority, military law enforcement officials must rely on other legal bases to assert authority over civilians. Meanwhile, these officials must ensure that their actions do not exceed the boundaries of permissible conduct and risk violating the Posse Comitatus Act.

This article presented two scenarios that military law enforcement officials are likely to encounter while serving at a federal military installation: (1) a civilian lawbreaker, being chased in "hot pursuit," crosses outside the boundary of federal jurisdiction (in the opening scenario to this article, Sergeant Smith climbs over the gate fence and pursues a fleeing felon into an off-post trailer park); and (2) a military official, within a close response range, personally observes-or is requested to respond to-a crime in progress off the installation. In each scenario, the law enforcement official must make an instantaneous decision about the extent of his or her authority. This article clarifies the boundaries of this authority.

The principle legal basis for military law enforcement authority over civilians is the inherent authority of the installation commander to maintain law and order on the installation. Military law enforcement officials, as the commander's agents, may arrest civilian lawbreakers who threaten law and order on the installation. Because their actions achieve an independent military purpose, and only incidentally benefit civil authorities, the Military Purpose Doctrine excepts this exertion of authority from the prohibitions of the Posse Comitatus Act. The commander's inherent authority and the Military Purpose Doctrine also permit certain off-post law enforcement activities aimed at civilians, such as undercover drug investigations. Since certain off-post crimes have an adverse impact *on* the installation, military investigators, pursuant to the commander's inherent authority, may travel off-post to investigate or conduct non-pervasive operations. Their authority, however, is generally limited to indirect, passive participation and does not include arrests and searches of civilians. "Direct" exertions of authority, such as arrests and searches, must be performed by local authorities.

But when faced with either of the two scenarios presented above, military law enforcement officials will have no time to coordinate with local authorities. Moreover, their conduct will inevitably be direct–such as an arrest and a search incident to arrest–and may involve the use of force. These officials must have a clear understanding of what they can and cannot do. This article has therefore presented various legal bases to warrant a response.

In the context of pursuing a civilian off the installation, the commander's inherent authority is transferred off-post. Under the common law doctrine of extraterritorial authority while in "hot pursuit," the military law enforcement official who observes a felony occur on post may pursue the lawbreaker off the installation. Once outside the boundaries, the official assumes the same powers as those possessed by local police. Furthermore, because the pursuit of a felon off the installation serves a valid military purpose, the Military Purpose Doctrine excepts the conduct from the prohibitions of the Posse Comitatus Act.

In the context of an emergency response to an off-post crime in progress. the military official may employ "citizen's arrest" authority. If the official personally observes–or is requested to help prevent–a felony or a misdemeanor breach of the peace, he may travel off post and conduct an arrest in the same manner as any citizen. Although the Military Purpose Doctrine likely will not apply (since there is no independent military pur-

pose achieved), the citizen's arrest will not violate the Posse Comitatus Act because it will not "pervade" the activities of civil law enforcement.

The clarification of the legal bases to conduct arrests is not intended to advocate an expansion in the role of military law enforcement officials. These officials derive their authority from the installation commander, and their actions should accomplish no more than needed to maintain law and order on the installation. Any significant expansion of this role runs the risk of violating the Posse Comitatus Act.

Nevertheless, there are times when military officials must assert their authority beyond the jurisdictional boundaries of the installation. Once they open the gate, however, their authority changes, and as the military's interest decreases, so does their authority. Without proper training and clear guidelines on the extent of their authority, military law enforcement officials—and their supervisors—run the risk of violating the Posse Comitatus Act. Particularly in such areas as off-post housing developments, where loyalties to military personnel and family members run up against the clear jurisdictional authority of civil law enforcement, military officials must understand the parameters of their authority. This article shows that, in many circumstances, military law enforcement officials do in fact possess arrest authority; it also shows that this power is limited. With proper training and guidance, however, military officials will find they have sufficient authority to carry out their missions of maintaining law and order on the installation and protecting military personnel and property.