24 MAR 1978

Ms. Deanne Siemer
General Counsel
Department of Defense
The Pentagon
Washington, D. C. 20301

Dear Ms. Siemer:

This is in response to your request that the Office of Legal Counsel consider the restrictions which the Posse Comitatus Act, 18 U.S.C. § 1385, places on the use of military personnel to assist the Department of Justice in the investigation and prosecution of frauds committed by contractors in the course of procurement by the Department of Defense.

We understand that the Criminal Division of the Department of Justice has suggested that the existing Memorandum of Understanding between the two Departments be revised to permit Air Force Office of Special Investigations and Army Criminal Investigation Division military personnel to assist in the handling of such cases after they have been referred to this Department for prosecution. These personnel have expertise in procurement investigations not otherwise available to the Department of Justice, and they can be expected to be familiar with particular cases from the pre-referral investigation. The Criminal Division intends to use these talents in questioning witnesses, organizing evidence, and providing expert advice. It does not intend to use OSI or CID personnel to make arrests, serve warrants, or perform searches. The immediate issue is the extent to which the Posse Comitatus Act restricts the use of military personnel in procurement fraud investigations.

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Attn: Ed Barry

The Posse Comitatus Act, 18 U.S.C. § 1385, provides:

> 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.

We are aware of no express statutory authority for Army or Air Force personnel to cooperate in the criminal investigation of procurement frauds committed by civilians. The general issue is thus whether the proposed cooperation would constitute "execution of the laws." 1/

After examining the legislative history of the Posse Comitatus Act and the limited number of judicial applications of it, we have concluded as follows:

1. The Act prohibits the use of military personnel to perform authoritative acts, such as making arrests, searches, seizures, or custodial interrogations, on civilian offenders within the civilian community.

2. Although the question has not been conclusively determined, the weight of authority is that the Act prohibits the use of military personnel as informants, undercover agents, or non-custodial interrogators in a civilian criminal investigation that does not involve potential military defendants or is not intended to lead to any official action by the armed forces.

1/ We note that the Posse Comitatus Act does not apply to the Navy and Marine Corps. However, Navy regulations incorporate the Act's prohibitions. See Sec. Nav. Inst. 5820.7 (May 15, 1974). Moreover, the proposed revision of Title 18, United States Code would extend the Act to the Navy and Marine Corps. See S. 1437, 95th Cong., 1st Sess., § 301 (1977). For practical purposes, this opinion is thus equally applicable to the use of Navy and Marine Corps personnel. See also United States v. Walden, 490 F.2d 372 (4th Cir. 1974).

3. The Act does not prohibit the armed forces from using military personnel in investigations which are required for them to perform their official functions or from disclosing information so collected to civilian law enforcement authorities.

4. The Act does not prohibit the armed forces from using military personnel to give expert advice or other indirect assistance to civilian law enforcement authorities.

It is by now a commonplace that the Posse Comitatus Act was passed as a partisan reaction to the equally partisan use of the Army for law enforcement purposes in the decade after the Civil War. 2/ The original attempt to restrict this practice was through a rider to the 1877 Army appropriation bill that would have prohibited the use of troops to support any state government. This measure passed the Democratic controlled House but was rejected by the Republican Senate as a restriction of the President's constitutional powers. 3/ In 1878, the House added a rider to the Army appropriation making it a felony to use the Army "as a posse comitatus or otherwise under the pretext or for the purpose of executing the laws" unless "expressly authorized by Act of Congress." The Senate amended this provision by striking out "under the pretext" of law enforcement and "express" authority, and by adding the authority of the Constitution to statutory authority. The conference committee devised the language of the present statute.

The proponents of the measure in both the House and Senate made it clear that they intended to prevent the use of troops as a posse comitatus: i.e., a body of

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2/ See, e.g., Note, The Posse Comitatus Act: Reconstruction Era Politics Reconsidered, 13 Am.Crim.L.Rev. 703, 704-710 (1976); Meeks, Illegal Law Enforcement: Aiding Civilian Authorities in Violation of the Posse Comitatus Act, 70 Mil.L.Rev. 83, 89-93 (1975).

3/ See Note, supra note 2, at 708-09.

4/ See Note, supra, note 2, at 709-10.

armed men employed for the occasion by the local marshal to overcome or overawe resistance in the execution of his duties. 5/ It is less clear what they meant by "otherwise to enforce the laws." Proponents of the Act in both Houses alluded to the use of troops to collect taxes, maintain order during strikes, and influence elections by intimidation of voters. However, the only approach to a general definition of execution of the laws was made by Senator Hill of Georgia.

Senator Hill contended that the abuse to be avoided was the use of persons subject to military law and discipline to execute the laws. "Executing the laws," he explained, was the actual or potential application of force by a civil officer under a court order, process, or other lawful command of the government. He stated that the only proper role for the Army was to suppress counterforce which was too great for the civil power to overcome, and he concluded:

> If there is anything that commends our system of government as a government designed for preservation it is that the military power shall never be called in to execute a civil duty, to enforce a civil process. As I say, they may put down opposition to it, but the courts alone and the civil officers alone ought to execute the process.
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> I care not by what agency it is brought about, the fact will remain that whenever you need the military arm habitually, or . . . whenever you conclude that it is right to use the Army to execute civil process, to discharge those duties which belong to civil officers and to the citizens, then you have given up the character of your Government; it is no longer a government founded in the consent of the people;

5/ See 7 Cong. Rec. 3581 (Congressman Kimmel), 3678-79 (Congressman Southard), 4240 (Senator Kiernan) (1878).

it has become a government of force. The Army is a government of force; it has no civil functions in the proper sence of the term. 6/

In sum, he believed that the Act should prevent the use of persons subject to military discipline as the power behind commands which are directed to the ordinary citizen. 7/

This general analysis and the specific cases mentioned by other proponents of the Act have a common element: military personnel applying force to the civilian community in the normal course of civil government. When Congress prohibited the use of the Army to execute the laws, it appears to have had in mind actual or threatened coercion by persons subject to military discipline on behalf of civil law enforcement officers. It was not presented with instances of advice or technical assistance to the civil authorities and did not consider this practice. 8/

Until recently, the Posse Comitatus Act received little attention in the courts. 9/ Modern federal cases applying the Act to military assistance to civilian law

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6/ 7 Cong. Rec. 4245-47 (1878).

7/ See also 7 Cong. Rec. 4243-44 (Senator Merriman) (1878). Senator Edmunds, an opponent of the measure, argued that it was necessary to place military force at the disposal of civil officers. 7 Cong. Rec. 4242 (1878).

8/ In the light of the structure of the Army and the state of law enforcement in 1878, there was probably nothing to be considered.

9/ The only cases between 1878 and 1960 involve the arrest by the military in occupied territory of persons subsequently tried for treason in the United States. See D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1952); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1949). All three courts held that Congress had not intended the statute to apply to foreign territories under military government, and that the arrests were therefore lawful.

enforcement fall into three groups: Wrynn v. United States; 10/ Walden v. United States; 11/ and the Wounded Knee Cases. 12/

Wrynn was a suit against the United States under the Federal Tort Claims Act by a bystander injured in a helicopter crash. The local Air Force commander had provided the aircraft and crew to assist civilian officials searching for an escaped prisoner. The district court held that the use of the helicopter and crew was assistance to local law enforcement officials in performing their duties, that the Posse Comitatus Act prohibited all such assistance, and that the persons involved were therefore not acting within their authority so as to make the United States liable under the FTCA. Wrynn v. United States, 200 F. Supp. 457, 463-65 (E.D. N.Y. 1961).

United States v. Walden, 490 F.2d 372 (4th Cir. 1974) was a prosecution of a civilian PX employee for selling firearms to ineligible purchasers. In the course of the investigation, enlisted Marines were used as undercover agents, posing as ineligible purchasers of firearms. The Court of Appeals held that the use of the Marines violated a Navy regulation which applies the Posse Comitatus Act to the Navy and Marine Corps. 13/ Id. at 324-25. The court stated in dictum that strong policy considerations supported a careful restriction of military involvement in civilian law enforcement. Id. at 375. It also cited sympathetically the argument of the Act's congressional sponsors that the Constitution prohibited the use of the military to enforce the laws without statutory approval.

10/ 200 F.Supp. 457 (E.D. N.Y. 1961).

11/ 490 F.2d 372 (4th Cir 1974).

12/ United States v. Casper, 541 F.2d 1275 (8th Cir. 1976); United States v. McArthur, 419 F.Supp. 186 (D. N.D. 1976); United States v. Red Feather, 392 F.Supp. 916 (D. S.D. 1975); United States v. Means, 383 F.Supp. 368 (D. S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), appeal dismissed, 510 F.2d 808 (8th Cir. 1975).

13/ The regulation is now Sec. Nav. Inst. 5820.7 (May 15, 1974).

14/ Id. However, it declined to impose an exclusionary rule on the ground that the violation was inadvertent and prior law unclear. Id. at 377.

The occupation of the hamlet of Wounded Knee, South Dakota, by armed protestors gave rise to several prosecutions in which the effect of the Posse Comitatus Act on Army assistance to civilian law enforcement officials was exhaustively considered. All four district courts found essentially these facts. Federal law enforcement at Wounded Knee was under the direction of the FBI. The Department of the Army sent Colonel Volney Warner, Chief of Staff of the 82d Airborne Division, to report on the need for the use of troops. 15/ He advised the FBI officials in charge to change their policy from shoot to kill to shoot to wound, to adopt the Army's rules of engagement for disorders, and to negotiate with the occupiers. The Army also provided logistical support, including armored personnel carriers, with a supply officer to keep an inventory. The military vehicles were maintained by the Nebraska National Guard but crewed by Justice Department personnel. Finally, the Nebraska Air National Guard provided reconnaissance flights. All of the district courts found that these activities constituted a use of "any part" of the Army and Air Force. 16/

Participants in the occupation were tried for violation of 18 U.S.C. § 231(a)(3), which prohibits interference with a law enforcement officer in the lawful enforcement of his duties during a civil disorder affecting a federal function. All of the courts involved held that to establish that the FBI were lawfully performing

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14/ See 7 Cong. Rec. 3581 (Cong. Kimmel), 4243 (Senator Merriman) (1978).

15/ Authority for their use would have been 10 U.S.C. §§ 332-34.

16/ See United States v. McArthur, 419 F.Supp. 186, 192-93 (D. N.D. 1976); United States v. Red Feather, 392 F. Supp. 916, 921 (D. S.D. 1975); United States v. Jaramillo, 380 F.Supp. 1375, 1377-78 (D. Neb. 1974).

their duties, the prosecution had to prove that the Army and Air Force assistance did not violate the Posse Comitatus Act. 17/

The district judge in United States v. Jaramillo, 380 F.Supp. 1375, 1380 (D. Neb. 1974), considered that any influence by Army personnel on civilian law enforcement officers would violate the Act. Since he could not find beyond a reasonable doubt that Col. Warner's advice had not influenced the FBI, he found for the defendants. This "influence" standard was followed by the judge in United States v. Means, 383 F.Supp. 368, 374-75 (D. S.D. 1974), who entered a directed verdict for the defendants. Neither decision examines the legislative history of the Act. Instead, Jaramillo cites Laird v. Tatum, 408 U.S. 1 (1972), in support of a public policy against any military involvement in civilian law enforcement. See United States v. Jaramillo, supra, 380 F.Supp. at 1379.

The district judge in United States v. Red Feather, 392 F.Supp. 916 (D. S.D. 1975), examined the legislative history and concluded that Congress had only intended to prohibit direct military involvement in law enforcement. He held that the "execution of the laws" forbidden by the Act consists of any member of the Armed Forces taking "an active role in direct law enforcement." United States v. Red Feather, supra, 392 F.Supp. at 924-25. This would include participation in or direction of:

> arrest, seizure of evidence, search of a person; search of a building, investigation of a crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect; and other like activities. Id.

Passive involvement, which is not "execution," includes presence to observe and report, preparation of contingency plans for lawful military intervention, advice to

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17/ See United States v. Casper, 541 Fed. 1275, 1277-78 (8th Cir. 1976); United States v. McArthur, 419 F.Supp. 287, 194 (D. N.D. 1976); United States v. Red Feather, 352 F.Supp. 916, 921 (D. S.D. 1975); United States v. Means, 383 F.Supp. 368, 374-77 (D. S.D. 1974); United States v. Jaramillo, 380 F.Supp. 1375, 1381 (D. Neb. 1974).

civilian officials, and use of personnel to deliver and maintain equipment for civilian use. Id. The court found that the military involvement at Wounded Knee was passive and therefore not "execution of the laws." Id.

The same result was reached in United States v. McArthur, 419 F.Supp. 187 (D. N.D. 1976), for a somewhat different reason. The district judge stated that Congress intended to prevent the military from exercising authority over civilians because the military by background and training, are not sufficiently sensitive to constitutional rights. Id. at 193-94. Citing Laird v. Tatum, 408 U.S. 1, 11 (1972), he reasoned that to "execute the laws" implied "an authoritarian act" and that the Posse Comitatus Act therefore prohibited using military personnel to "subject the citizens to the exercise of military powers which were either regulatory, prescriptive, or compulsory in nature, either presently or prospectively." United States v. McArthur, supra, 419 F.Supp. at 194. Colonel Warner, the court found, had no control over the FBI's operations; his influence depended entirely on expertise and persuasiveness. Hence, his presence and advice subjected no one to military authority, and he did not "execute the laws." Id. at 195.

Moreover, the court stated that the Economy Act, 31 U.S.C. § 686(a), provided statutory authority for the use of military personnel and supplies which did not otherwise violate the Posse Comitatus Act. Col. Warner's expert advice on the management of civil disturbances was merely a personal service supplied from one department to another.

Finally, the court noted, Colonel Warner was performing a legitimate function by observing and reporting to the Department of Defense. The President has statutory authority to use troops to execute the laws. 18/ This includes the authority to have members of the military prepare to take such action if it should be ordered. United States v. McArthur, supra, 419 F.Supp. at 195.

The Court of Appeals for the Eighth Circuit affirmed the McArthur and Red Feather convictions in United States

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18/ See 10 U.S.C. §§ 332-34.

v. Casper, 541 F.2d 1275 (8th Cir. 1976). 19/ While the court affirmed the finding of fact in McArthur that the Act had not been violated, it did not discuss the legal standards used by the two district courts. 20/

Also of interest is United States v. Banks, 539 F.2d 14, 16 (9th Cir. 1976), where a civilian arrested on a military base by Air Force Police contended that this violated the Posse Comitatus Act. The court held that the Act did not restrict the historic authority of the armed forces to maintain order on property under their control. 21/

The state courts of Oklahoma have also considered the Act's application in three drug law prosecutions. In Hubert v. State, 504 P.2d 1245 (Okl.Cr.App. 1972) and Hildebrandt v. State, 507 P.2d 1323 (Okl.Cr.App. 1973), CID investigations of Army personnel led to civilian suppliers. The local police were notified, and CID personnel made undercover buys from the civilians. Arrests were made by civilian police. The state court held that because the information was first developed in a legitimate military investigation, and the military personnel exercised no "authority" over the civilian offenders, the Act was not violated. Hubert v. State, supra, 504 P.2d at 1246; Hildebrandt v. State, supra, 507 P.2d at 1324-25. 22/ In Lee v. State, 513 P.2d 125 (Okl.Cr.App. 1973),

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19/ The Posse Comitatus Act finding in Red Feather was before the district court in McArthur on a stipulated joint motion for reconsideration. United States v. Casper, 541 F.2d 1275, 1278 n. 8 (8th Cir. 1976).

20/ Judge Heaney, dissenting, would have adopted the "influence" standard of United States v. Jaramillo. United States v. Casper, 541 F.2d 1275, 1280-81 (8th Cir. 1976). The majority thus disapproved of the holding of that case sub silentio.

21/ See generally Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961); 3 Op. Atty Gen. 264 (1837).

22/ Since the court found the Act had not been violated, it did not pass on the defendants' claim that an exclusionary rule was the proper remedy.

cert. denied, 415 U.S. 932 (1973), the subject of the investigation was a soldier living off base. CID agents under the direction of the local police made buys to further a purely local investigation. The court, without mentioning the subject's military status, held that the Act was not violated because the undercover agent exercised no authority over the subject. 23/ Lee v. State, supra, 513 P.2d at 126.

Several general principles emerge from these sources. The first is that the Act was intended to prohibit the employment of persons subject to military discipline to coerce or threaten to coerce civilians in the ordinary course of criminal or civil proceedings. The use of the term "execute" and the practices complained of by the Act's proponents show that Congress intended to remove the threat of actual or potential military force from the ordinary occasions of compulsion by the civil authorities. This intent is consistent with the traditional Anglo-American subordination of the military to civil authority. 24/

The second, which is the converse of the first, is that the Act does not prohibit military assistance to civilian law enforcement that does not involve the military in the exercise of authority over civilians. Congress did not condemn military expert advice or technical assistance to civilian authorities, and these do not create the danger of military compulsion of civilians which it did fear.

23/ Lee's military status is mentioned in Note, supra note 2, at 722 n. 109. The article is severely critical of the decision.

It should also be noted that Lee, as written, is contrary to Walden v. United States, 490 F.2d 324 (4th Cir. 1974). The Walden court did not cite the earlier decision.

24/ See Laird v. Tatum, 408 U.S. 1, 17-24 (1972) (Douglas, J. dissenting); United States v. Walden, 490 F.2d 372, 373-75 (4th Cir. 1974); United States v. McArthur, 419 F.Supp. 187, 193-94 (D. N.D. 1976); 7 Cong. Rec. 3579 (Rep. Kimmel), 4243 (Sen. Morrimon) (1878).

Thirdly, while Congress intended to keep military force out of civilian government there is no indication that it meant to affect the Army's internal administration or the performance of its proper functions.

Thus, persons subject to military discipline may not aid law enforcement in the civilian community by participating without constitutional or statutory authority in an arrest, pursuit, search, seizure, service of process, or custodial interrogation or by providing an actual or potential show of force to prevent disorder. 25/ Similarly, they may not intervene in a purely civilian criminal transaction as informers or undercover agents under the control of civilian officials where their participation is not an inherent part of the transaction. 26/ On the other hand, military personnel acting in their official capacity may provide civilian law enforcement officials with expert advice as long as it remains merely that and does not become control. 27/ They may also collect

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25/ See United States v. McArthur, 415 F.Supp. 187, (D. N.D. 1976); United States v. Red Feather, 392 F.Supp. 916 (D. S.D. (1976); Wrynn v. United States, 200 F.Supp. 457 (E.D. N.Y. 1961); Danko v. State, 548 P.2d 819, 824-25 (Kan. 1976); 17 Op. Att'y Gen. 71 (1881).

26/ See United States v. Walden, 490 F.2d 372 (4th Cir. 1971). But cf. Lee v. State, 513 P.2d 125 (Okl. Cr. App. 1973). Since the crime in Walden took place on property under military control, its particular holding is called into question by United States v. Banks, 539 F.2d 14 (9th Cir. 1976).

We do not believe that Walden would cover a case where military personnel were approached by a civilian to commit, for example, espionage or theft of government property because of their military position. In such cases the contemplated crime could not take place without the help of a member of the armed forces and the civilian offender initiated military involvement. The purpose of the Posse Comitatus Act would not be served by preventing the persons approached from cooperating with civilian law enforcement officials.

27/ United States v. Casper, 541 F.2d 1275 (8th Cir. 1976); United States v. McArthur, 419 F.Supp. 187 (D. N.D. 1976); United States v. Red Feather, 392 F.Supp. 916 (D. S.D. 1975).

information necessary for the performance of the lawful functions of the armed services. 28/

Under these principles, the Posse Comitatus Act does not prohibit OSI or CID personnel from advising the Department of Justice about the proper handling of the investigation or prosecution of a procurement fraud case. Such advice could include analysis of collected information, recommendations for further inquiry, and suggestions as to the presentation of the case. By either the standard of Red Feather or McArthur this involvement is indirect and non-authoritarian: there is no contact with civilian targets of law enforcement, no actual or potential use of military force, and no military control over the actions of civilian officials.

Similarly, the Act does not prohibit the use of military personnel to interview witnesses or examine documents when the information is necessary for the service concerned to take administrative action. As you are aware, the armed services have extensive administrative remedies available to them in their relations with contractors. Under the Truth in Negotiations Act, 10 U.S.C. § 2306(f), contractors in large negotiated procurements must provide the service concerned with accurate cost data, and the service may unilaterally change the contract price to correct false statements of costs. 29/ The armed services also have the right to cancel a contract for fraud in the inducement or performance. 30/ Finally, after an administrative hearing, a

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28/ United States v. McArthur, 419 F.Supp. 187 (D. N.D. 1976); cf. United States v. Banks, 539 F.2d 14 (4th Cir. 1976).

29/ See 10 U.S.C. § 2306(f); 32 CFR § 7-104.29(a) (1975). Appeals by a contractor are determined by the Armed Services Board of Contract Appeals under the disputes clause of the contract. See generally Nash & Cibinic, Federal Procurement Law 313-25 (1969).

30/ See United States v. Acme Process Equipment Co., 385 U.S. 138, 142-45 (1967); Brown v. United States, 524 F.2d 693, 699-700 (Ct. Cl. 1975). See generally Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1957).

service may debar a contractor from further business because of fraud. 31/ It is reasonably necessary to the exercise of these functions for the armed services to collect information about the award and performance of their contracts by interviewing persons connected with them and examining business records. Nothing in the legislative history of the Posse Comitatus Act leads to the conclusion that Congress understood the "execution of the laws" to include the administration of their own contracts by the services. This being so, military personnel may be used to perform that function.

If the armed services may lawfully use military personnel to collect information relating to contracts for their own use, the Posse Comitatus Act does not prohibit them from turning it over to the Department of Justice. As stated above, Congress intended to keep military personnel from exerting force on civilians in matters that were of concern only to the civil authorities. Where the services have a legitimate interest in collecting information for their own proceedings, they will be involved with the civilian targets of an investigation whether or not they keep the results to themselves. Thus, the policy of the Act is not furthered by preventing disclosure. Moreover, the contrary interpretation would lead to unreasonable results. It would, for example, prevent a military policeman who lawfully arrested a civilian on a military post from reporting the arrest or testifying for the prosecution. 32/ It would prevent evidence collected for a prosecution under the Uniform Code of Military Justice from being used to prosecute a civilian co-defendant. More to the point, it would prohibit the existing practice of reporting possible procurement frauds that are discovered by military investigators. Accordingly, we conclude that Congress did not intend the Act to strike the armed services dumb when it left them free to see and hear.

31/ 32 CFR § 1-600(b), 1-604.1(iii). See generally Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).

32/ See United States v. Banks, 539 F.2d 14 (9th Cir. 1976); cf. Hubert v. State, 504 P.2d 1245, 1246 (Okl.Cr. App. 1972).

It is not clear whether the Act prohibits the use of military personnel under civilian direction for non-custodial witness interviews in purely civilian investigations. On the one hand, non-custodial questioning is not an "authoritarian act," 33/ particularly when the target of the investigation is not involved. A narrow reading of the legislative history might thus lead one to conclude that it is not within the class of military activity Congress intended to prohibit. On the other, such interviews are a characteristic police activity and involve contact with the civilian population. They would constitute direct participation in law enforcement under the standard in Red Feather. 34/ Moreover, the use of military personnel under civilian direction to perform a routine civil police function closely resembles use as a posse comitatus itself. While we cannot state with certainty how a court might rule, we believe that the traditional suspicion of military involvement in law enforcement 35/ would probably lead a court to find that the Act had been violated by the use of military personnel to interview witnesses in a civilian criminal investigation where the armed services have no independent authority to conduct an investigation.

In conclusion, the Posse Comitatus Act prohibits the use of military personnel to provide direct assistance to civilian authorities in applying legal force to civilians. It thus prohibits the use of OSI or CID personnel to make arrests, searches, or seizures in the civilian community in connection with a Department of Justice investigation of a procurement fraud case. 36/

33/ See United States v. McArthur, 419 F.Supp. 187 (D. N.D. 1976).

34/ United States v. Red Feather, 392 F.Supp. 916, 924-25 (D. S.D. 1975).

35/ See note 24, supra.

36/ This, of course, does not affect the statutory or contractual access of the armed services to contractors' financial records. See 10 U.S.C. § 2313(a); 32 CFR § 7-104.41(a).

It does not prohibit military personnel from providing expert advice to civilian law enforcement personnel about particular situations, and it does not prohibit the armed services from sharing with civilian law enforcement officials information which they collect in the performance of their lawful functions. Thus, as long as the military personnel are not used to exercise authority over civilians, the Posse Comitatus Act permits them to participate with Department of Justice personnel in a joint investigation that serves both federal civilian law enforcement and lawful military purposes.

We trust that these principles can be applied to permit military personnel to provide various forms of assistance to a Department of Justice investigation of a criminal fraud committed on the Department of Defense in the course of procurement. This Office will be glad to review any concrete proposals for coordinated investigations for compliance with these principles.

Sincerely,

Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel