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*United States Marine Corps
Command and Staff College
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Quantico, Virginia 22134-5068*

MASTER OF MILITARY STUDIES

TITLE:

THE ETHICS OF THE POSSE COMITATUS ACT:
HOW LAW AND POLICY AFFECT U.S. MARINE CORPS
SUPPORT TO LAW ENFORCEMENT

AUTHOR:

MAJOR KORVIN S. KRAICS,
UNITED STATES MARINE CORPS

AY 10-11

Mentor and Oral Defense Committee Member:

Approved:

Date:

Jonathan F. Phillips
[Signature]
3 May 2011

Oral Defense Committee Member:

Approved:

Date:

ERIC SHIBUYA
[Signature]
3 May 2011

Executive Summary

Title: The Ethics of the Posse Comitatus Act: How Law and Policy Affect U.S. Marine Corps Support to Law Enforcement.

Author: Major Korvin S. Kraics, United States Marine Corps

Thesis: In light of the Posse Comitatus Act's questionable jurisdiction and enforceability over a Marine commander, and despite the numerous exceptions to the PCA carved from law and policy, one principle of military ethics remains: The military should not conduct, or create the appearance of conducting, domestic searches, seizures, interdictions, intelligence collection, or arrests upon U.S. citizens.

Discussion: Marine commanders might be unaware of the convoluted collection of laws, court rulings, and policy directives that create the body of domestic operations guidance beyond the Posse Comitatus Act (PCA) or how these principles might realistically affect them under commonplace circumstances. The courts are conflicted about how to apply the PCA to the Department of the Navy (DoN), and the PCA is yet to place a commander in criminal jeopardy. Adding to the confusion, Congress, the Department of Defense (DoD), and the DoN have also created countless entangled exceptions to the PCA that might leave a commander wondering how to engage in a proper course of action when instincts point otherwise to a PCA violation. Nonetheless, non-punitive DoD and DoN policies advise DoN commanders to adhere to the PCA, which transform the issue of PCA adherence from a matter of criminal liability to a matter of compliance with military institutional norms—or military ethics. Because military ethics affect the analysis, the appearance of inappropriate military use in a domestic context is equally important. Therefore, because domestic operations guidance is convoluted, neither a bottom-up nor a top-down approach to understanding a commander's role in domestic operational law will sufficiently guide a Marine commander toward appropriate action. Only a holistic review of the body of domestic operations guidance can distill the essence of the PCA to provide a guiding principle for situations that do not fit squarely into the PCA exceptions carved out of law and policy.

Conclusion: It is false for a Marine commander to assume that joint operations with LE officials will criminalize him under PCA, and it is equally false for a Marine commander to assume that the PCA has no effect upon joint operations with law enforcement officials. Thus, Marine commanders must have a guiding principle for operational scenarios that do not fall squarely into the exceptions of the PCA. In other words, because a commander might be able to violate the PCA with impunity, the PCA's application is more realistically a matter of professional ethics than law.

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THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

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Preface

While searching for an MMS topic, I called Headquarters Marine Corps, Judge Advocate Division, International and Operational Law Branch, and asked about any operational law issues in need of examination. I expected to receive steerage toward current stability operations matters such as Afghanistan ROE, ISAF detainee operations, and rule of law development in COIN. Instead, I was surprised when Major Joe Schrantz directed me toward the contentious domestic operational law topic of routine military support to law enforcement. After informing me that the topic was ripe for exploration and that guidance on the topic was sparse, he invited me develop guidance for scenarios that fall in the seams of domestic operational law and policy. Upon researching the issue, I learned that this topic is deceptively complicated and that certain domestic operational law principles that I assumed are far more intricate upon scrutiny. I would first like to thank my friend Joe for helping me find this topic.

I would also like to thank Dr. Jonathan Phillips and LtCol Shawn Callahan, USMC, at Marine Corps University, Command and Staff College. Dr. Phillips provided me with the clear guidance and mentorship necessary in development of this thesis. Writing about dry laws and directives is taxing; reading one's summary of dry laws and directives is perhaps more taxing. LtCol Callahan tolerated and entertained my outlandish ideas in class almost every day. I thank both of you gentlemen for putting up with me.

Last but never least, I thank my wife, Crista...for everything.

I. Introduction

Domestic operational law regarding the use of military resources and capabilities is increasingly complex. An analysis of domestic operation authorities usually begins with the Posse Comitatus Act (PCA)—a criminal liability statute the language of which most commanders are likely familiar. Arguing, and perhaps overstating, the PCA’s weakness, some scholars have suggested that the “use of military in domestic [LE] has repeatedly led to disaster.”¹ These scholars call for extreme reform measures that remove all PCA exceptions and punish severely any commander who participates in LE operations.² These scholars also focus on public mistrust of the military and ignore the routine cooperation between military and civilian LE agencies that occurs without disaster or public outcry. Other scholars overstate the PCA’s weight, pointing out that, “for the military commander, the ramifications [for involvement in domestic LE] could be...criminal and career ending.”³ Yet these latter scholars provide nothing in their analysis to guide the commander toward appropriate action, and they also focus on the potential for criminal liability without evidencing where any commander has faced criminal punishment under the PCA.

Criminality notwithstanding, “military commanders understand the obligation to honor individuals’ constitutional freedoms, and they receive indoctrination on the role of the military in a democracy.”⁴ For example, it is well accepted amongst Marine commanders that the law ordinarily forbids using military police to conduct off-installation surveillance and patrols. On the other hand, many Marine commanders might be unaware of the convoluted collection of laws, court rulings, and policy directives that create the body of guidance for domestic operational law beyond the PCA and how the principles therein might realistically affect them under commonplace circumstances. In other words, the PCA is important, but there is much

more.

This paper assesses the laws and policies that further define the appropriate role of the military in domestic law enforcement (LE) under the PCA. More specifically, it explores whether a guiding ethical principle rooted in law and policy exists for application in domestic operational law matters that fall in the seams of the body of guidance for domestic operations. Ultimately it holds that, as a principle of military ethics: The military does not conduct, or create the appearance of conducting, domestic searches, seizures, interdictions, intelligence collection, or arrests (hereinafter SSICA) upon U.S. citizens. It offers this principle recognizing two assumptions: First, military support to LE agencies is often routine, lawful, and without incident. Second, in the vast majority of instances involving military support to LE, it is unlikely that any commander would face criminal prosecution under the PCA.

Though not exhaustive, this paper serves as a primer for Marine commanders to comprehend the essence of the PCA for decision-making during routine support request from civilian LE agencies. When read in a vacuum, certain domestic operations laws and directives can lead a commander to believe incorrectly that a particular action is permissible because the guidance fails to capture contrary principles outlined in other laws or directives. Most restrictive laws and policies in this field, for example, contain the language “unless otherwise authorized in law,” or words to the same effect. Equally, most permissive laws and policy in this field contain the language, “in accordance with other law,” or words to the same effect. The upshot of this entanglement is that one must cross-reference all laws and directives in this area of law lest hidden exceptions yield faulty conclusions. In the alternative, simply relying on the PCA’s plain language can lead a commander to incorrectly believe that certain actions are restricted when many valid exceptions to the PCA indeed exist in law and policy.

Therefore, because domestic operations guidance is convoluted, neither a bottom-up nor a top-down approach to understanding a commander's role in domestic operational law will sufficiently guide a Marine commander toward appropriate action. Rather, only a holistic review of the body of domestic operations guidance can distill the essence of the PCA to provide a guiding principle for situations that do not fit squarely into the PCA exceptions carved out of law and policy. This paper discusses how court inexactitude and government policies have transformed the issue of PCA adherence from a matter of criminal liability to a matter of compliance with military institutional norms—or military ethics. It next illustrates how Congress, the Department of Defense (DoD), and the Department of the Navy (DoN) have created countless entangled exceptions to the PCA that might leave a commander wondering how to engage in a proper course of action when instincts point otherwise to a PCA violation. Moreover, after evidencing where Congress has carved out exceptions to the PCA for extreme instances such as insurrections; nuclear, biological, and chemical emergencies; and natural disasters, this paper argues that DoD policy rather than law has expanded military commanders' authority under certain extraordinary circumstances.⁵ In addition to emergency exceptions, this paper also explores some routine PCA exceptions for information, equipment, and personnel support to LE agencies and discusses how the appearance of inappropriate military use in a domestic context affects the analysis. Lastly, it applies this principle to hypothetical scenarios that seem to evade the standard PCA exceptions found in law and policy.

II. The PCA's Applicability to the Navy and Marine Corps.

To understand the use of military support in a domestic context, one must first analyze the depth and breadth of Title 18 U.S.C. § 1385, commonly referred to as The Posse Comitatus Act (PCA). Translated to mean “power of the county,” the PCA 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 under this title or imprisoned not more than two years, or both.”⁶

Sponsored by the Democrats in 1878 and amended to include the Air Force in 1956, the PCA reflected “the inherited antipathy of the American to the use of troops for civil purposes.”⁷ By its plain language, the PCA suggests that the Department of Justice (DoJ) may indict any person, even a military commander, who employs any element of the Army or the Air Force to carry out State or Federal law unless Congress had previously codified the same act as an exception to the PCA. However, in the majority of appellate court cases that cite the PCA in their judicial opinion, the PCA appears indirectly as a criminal procedure or evidentiary matter that in no way places any named commander in jeopardy of fine or imprisonment.⁸ Thus, there has yet to be a test before the courts to determine what it means to use any part of the Army or the Air Force as a posse comitatus as contemplated in the PCA’s language or to determine the extent in which any commander of any service can receive a fine or imprisonment under the PCA.

Additionally, for the Navy and Marine Corps specifically, it is unclear whether using military forces to execute domestic laws would constitute a PCA violation as a matter of criminal law or as a matter of DoD policy. Although the PCA’s plain language only criminalizes those who unlawfully use the Army and the Air Force in a domestic context, Congress mandated the Secretary of Defense under 10 U.S.C. § 375 to proscribe any Army, Navy, Air Force, or Marine Corps activity involving a search, seizure, arrest, or “other similar activity unless otherwise authorized by law.”⁹ It is, however, noteworthy that 10 U.S.C. § 375 simply mandates the SecDef to create policies and does not inherently impose any criminal liability for using the Navy and Marine Corps as a posse comitatus. Because of this absence in statutory clarity,

Federal courts have had difficulty defining the how the PCA affects the DoN. Whereas some courts have held that the PCA should be limited to its plain language addressing only the Army and Air Force, others have held that the PCA includes the Navy by implication, and yet others have held that 10 U.S.C. § 375 incorporates the Navy into the PCA's criminal liability.¹⁰ Moreover, the United States Supreme Court has yet to speak on the issue of the PCA's applicability to the Navy and Marine Corps.

Despite inexactitude from the courts, the DoD and DoN have applied the PCA to the Navy and Marine Corps as a matter of policy. However, rather than clarifying the scope in which the PCA can affect a commander's decisions making, these policies only deepen the matter's complexity by blurring what is permissible under law and policy. For example, DoD Directive (DoDD) 5525.5 provides, "DoD guidance on the Posse Comitatus Act...is applicable to the [DoN] and the Marine Corps as a matter of DoD policy, with such exceptions as may be provided by the Secretary of the Navy on a case-by-case basis."¹¹ The DoN supplements this policy in Secretary of the Navy Instruction (SECNAVINST) 5827.7c, which provides, "Commands must adhere to [the PCA] in deciding on the provisions of military personnel to civilian law enforcements [sic] requests."¹²

These policy documents, however, more realistically reflect an ethical, rather than a legal, constraint upon a commander's decision making. First, executive policy directives provide no legal mechanisms through which the DoJ may indict any individual for criminal liability. Second, in terms of military justice, nothing in the language of either policy suggests a punitive intent necessary for punishment under Article 92 of the Uniform Code of Military Justice (UCMJ). Without this punitive nature, a violation of these policies would be punishable only as

instances of dereliction of duty—a charge insufficient for willful PCA violations and disproportionately severe for PCA violations made in good faith under unclear guidance.

Thus, the nebulous body of law and policy surrounding the PCA and its questionable enforceability upon the DoN render ambiguity for the Marine commander challenged with grasping the depth and breadth of the rules for domestic operations. Moreover, Congress, the DoD, and the DoN have carved out a multitude of intertwining exceptions to the PCA and 10 U.S.C. § 375, thereby complicating matters further for the Marine commander. These exceptions cover instances such as insurrections, nuclear emergencies, biological and chemical emergencies, natural disasters, civil disturbances, and routine support to LE agencies. Assuming an inability to enforce the PCA punitively upon the DoN, a Marine commander charged with doing the right thing for the right reasons is therefore left to reasonably question what indeed would be the proper course of action in the context of domestic operations. Moreover, how should the Marine commander respond in the face of conflicting guidance? This paper suggests that a holistic review of statutory and policy based exceptions to the PCA distills the essence of the PCA not reflected in its plain language. Grasping this essence, this paper argues, is crucial to understanding how one ethically applies the PCA to circumstances that do not fall squarely within statutory and policy exceptions.

III. Insurrections; Nuclear, Biological, Chemical, Natural Disaster, and Civil Disturbance Emergency Exceptions to the PCA.

For incidents involving insurrections, Congress has carved out perhaps the widest exceptions to the PCA and 10 U.S.C. § 375. However, these statutory exceptions are presidentially directed and imply no independent authority on behalf of a military commander to engage in domestic operations. For instance, when the President considers that unlawful

obstructions, combinations, assemblages, or rebellions against United States authority threaten the enforcement of federal laws by the ordinary course of judicial proceedings, he may, under the Insurrection Act (10 U.S.C. §§ 331-333), use the armed forces as he considers necessary to enforce the law or suppress the rebellion.¹³ The Insurrection Act also mandates the President to use the armed forces as he considers necessary when state LE officials fail to suppress insurrections that deprive state residents of right, privilege, immunity, or protection named in the Constitution and secured by law.¹⁴ Presidents have historically used this authority to enforce school desegregation and quash disturbances such as the 1894 Pullman Strike and 1992 Los Angeles riots.¹⁵

Unlike the presidential direction required to use military force to disrupt insurrections, statutory law requires only SecDef approval for military responses to nuclear emergencies, but the military still maintains plenary powers to enforce the law. For instance, when the Attorney General (AG) and SecDef determine that a nuclear emergency exists, Title 18 U.S.C. § 831(e) (1) permits the SecDef to support an assistance request from the AG if the SecDef determines that “the provision of such assistance will not adversely affect the military preparedness of the United States.”¹⁶ Title 18 § 831(e)(2) defines “emergency situation” in a nuclear disaster context as “a circumstance that poses a serious threat to the interest of the United States” in which “enforcement of the law would be seriously impaired if the assistance were not provided,” and in which “civilian law enforcement personnel are not capable of enforcing the law.”¹⁷ Under these limited circumstances, the SecDef’s assistance may include the use of DoD personnel to “arrest persons and conduct searches and seizures” and conduct activity incidental to violations of illegal handling of nuclear material.”¹⁸

In cases where the SecDef and AG jointly determine that an emergency situation

involving biological or chemical weapons of mass destruction exists, the SecDef, under 10 U.S.C. § 382, may provide military support, but the latitude for military LE activities no longer exists. In these instances, the SecDef may support the AG if the “special capabilities and expertise of the [DoD] are necessary and critical to counter the threat posed by the weapon involved” amongst other severable criteria.¹⁹ The SecDef may also provide under 10 U.S.C. § 372(b) any suitable material or expertise to a Federal, State, or local LE or emergency response agency if the SecDef determines that an item is not reasonably available from another source.²⁰ Unlike nuclear disasters, however, this body of law does not authorize DoD personnel to conduct arrests, conduct searches or seizures, or participate directly in intelligence collection for LE purposes.²¹

By statute alone, military responses to domestic natural disasters also require SecDef authority, but the SecDef no longer requires AG approval prior to military action. Section 5170b of The Stafford Act (42 U.S.C. § 5121 *et seq.*) sets forth the President’s general authority to “provide assistance essential to meeting immediate threats to life and property resulting from a major disaster.”²² With regard to the DoD, section 5150b(c) of The Stafford Act expressly permits the SecDef to use DoD resources to perform “any emergency work which is made necessary by such incident and which is essential for the preservation of life and property” during the immediate aftermath of a disaster that would likely qualify for Stafford Act assistance.²³ This emergency work, however, is limited to ten days and should occur, as a general rule, only after the Governor of a State has made a request for assistance upon the President.²⁴ This section also specifies various other assistance authorizations, including equipment and personnel sharing, medical support, and the “reduction of immediate threats of life, property, and public health and safety.”²⁵

Published 29 December 2010, DoDD 3035.18 provides overarching policy guidance for DoD support to civil authorities and, from an analytical (as opposed to historical) standpoint, provides the first instance where military commanders may autonomously use their resources and capabilities in a domestic context. Drawing more from pragmatism than legal authority, this policy directive endows “Federal military commanders” with an “Immediate Response Authority.” This authority permits military commanders to “provide an immediate response by temporarily employing the resources under their control...to save lives, prevent human suffering, or mitigate great property damage within the United States” in disastrous situations where time would not permit approval from a higher authority.²⁶ For example, during a natural disaster such as a flood or hurricane, this policy would allow a commander to use his personnel, vehicles, and equipment to rescue persons in imminent danger when otherwise waiting for a civilian response or an approval authority would cost lives. Despite its sweeping language, however, the Directive cautions commanders not to subject civilians to military power that is “regulatory, prescriptive, proscriptive, or compulsory.”²⁷ The Directive also requires commanders to end the immediate response “when the necessity giving rise to the response is no longer present,” such as the availability of adequate resources and support from other appropriate agencies.²⁸ Thus, though the commander can help in these cases, he cannot assume control of the situation.

In addition to the Immediate Response Authority, DoDD 3025.18 also grants Federal military commanders an “Emergency Authority”—yet another policy-based PCA exception born from practicality rather than law. Under this authority, Federal military commanders may “engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances” that threaten significant loss of life or wanton destruction or property when other authorities are unable to protect Federal property or government functions.²⁹ This policy, in

essence, invites the commander to anticipate and exercise the President's insurrection powers in events such as large riots and violent protest when abstaining otherwise would result in the death of those in imminent danger. The Directive warns, however, that commanders should reserve action under this authority for "extraordinary emergency circumstances where prior authorization by the President is impossible."³⁰ For circumstances other than those requiring Immediate Response or Emergency Authorities, the SecDef alone may approve military support to civil authority in cases such as civil disturbances, CBRNE events, and assistance to civilian LE organizations (except as permitted in DoDD 5525.5, which this paper will discuss later).³¹

Drafted over a decade before DoDD 3025.18, DoDD 3025.12 focuses more narrowly upon the topic of military assistance for civil disturbances. This Directive defines a civil disturbance as "group acts of violence and disorders prejudicial to public law and order." The Directive also differentiates civil disturbances from civil emergencies, which it defines as "any natural or manmade disaster or emergency that causes or could cause substantial harm to the population or infrastructure."³² As a matter of policy, the DoDD 3025.12 emphasizes that State and local governments, and perhaps Federal agencies other than the DoD, maintain the "primary responsibility for protecting life and property and maintaining law and order in the civilian community."³³ This Directive forbids the use of military forces to assist in civil disturbances without presidential authorization except when necessary during "sudden and unexpected" civil disturbances "to prevent loss of life or wanton destruction of property, or to restore governmental functioning and public order."³⁴ During instances of domestic terrorist incidents, the SecDef retains the sole authority under this Directive to employ U.S. counterterrorism forces and military observers.³⁵

To sum, in circumstances where a military commander might permissibly augment (or

even usurp in extreme cases) local LE power, the commonality is that traditional LE is either unable or unwilling to control civil disturbances. Regardless of the legal structure for responding to a domestic emergency, the reality is that local civil authorities, not state or federal, have the first-response tasks at the outset of a disaster.³⁶ Furthermore, using the military to quash a civil disturbance generally requires presidential action, after which the military may “enforce the law” in support of or perhaps in spite of LE agencies. Absent a presidential directive, the AG may seek military support, but the SecDef possesses veto power if he believes that support will affect military preparedness. In the unlikely event of a nuclear emergency that seriously threatens the United States, the military commanders may become involved in SSICA in a domestic context contrary to the PCA’s restrictions, but the same autonomy is absent in chemical or biological emergencies. Lastly, absent presidential or SecDef authorization, a military commander may temporarily use his military resources and capabilities only when seeking permission would otherwise be costly to lives and property. This authority, however, is not based in law, and it is intended to provide aid and security to the domestic population, not subject them to military authority.

IV. Routine Support Exceptions to the PCA.

Insurrections, nuclear disasters, chemical and biological emergencies, natural disasters, and civil disturbances represent extreme and rare cases for exceptions to the PCA and 10 U.S.C. § 375. Congress, however, has also added to the convoluted legal mixture by enacting lesser-known exceptions to the PCA for routine matters that have trickled into DoD and DoN policy. Title 10 U.S.C. § 371, for example, permits the Secretary of Defense (SecDef) to “provide to Federal, State, or local civilian LE officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law

within the jurisdiction of such officials.”³⁷ This provision also requires the SecDef to (1) take into account civilian LE officials’ information needs while planning and executing military training or operations, and (2) provide intelligence information to civilian LE officials relevant to their LE duties.³⁸ Under 10 U.S.C. § 372, the SecDef may also make any equipment available to any Federal, State, or local civilian LE official for LE purposes.³⁹ The term “equipment” in this statute also includes associated DoD supplies, spare parts, base facilities, and research facilities.⁴⁰ With regard to training and advising civilian LE officials, 10 U.S.C. § 373 permits the SecDef to make DoD personnel available to provide expert advice and “train Federal, State, and local civilian LE officials in the operation and maintenance of equipment.”⁴¹

Title 10 U.S.C. § 374 permits the SecDef to make DoD personnel available for the maintenance of Federal, State, and local civilian LE equipment and allows DoD personnel to operate federal equipment under limited circumstances.⁴² In these instances, however, DoD agencies may only provide support “to the extent that [the support] does not involve direct participation by such personnel in a civilian law enforcement operation.”⁴³ Permissible circumstances to operate LE equipment include foreign or domestic counter-terrorism operations, enforcement of the federal controlled substance statutes (i.e., 21 U.S.C. § 801 et seq. and 21 U.S.C. § 951 et seq.), and maritime drug enforcement amongst others.⁴⁴ Even when DoD personnel operate LE equipment under this statute, the law requires that they do so only within a limited scope. Permissible operating parameters include monitoring air and sea traffic or surface traffic outside the geographic boundary of the U.S., conducting aerial reconnaissance, and communicating with vessels or aircraft outside U.S. land area for direction to appropriate civilian officials.⁴⁵ In rare instances during LE operations outside the U.S., and with SecDef, Attorney General, and Secretary of State approval, DoD personnel may assist in transporting civilian LE

personnel during joint operations, operate a forward base for civilian LE, and transport suspected terrorist from foreign countries to the U.S. for trial.⁴⁶

In addition to the statutory exceptions to the PCA that erode criminal liability for routine military support to LE, the DoD and DoN have also promulgated routine PCA exceptions as a matter of policy. For example, DoDD 5525.5 permits further exceptions to the PCA “as may be provided by the Secretary of the Navy on a case-by-case basis.”⁴⁷ Furthermore, because the PCA as a criminal statute is weak, the DoD and DoN are well secure in directing commanders in policy directives to “cooperate with civilian law enforcement officials to the extent practical” without compromising military preparedness, national security, or “the historic tradition of limiting direct military involvement in civilian law enforcement activities.”⁴⁸ Restating 10 U.S.C § 371, both of these policy documents permit military commanders to provide “any information collected during the normal course of military operations to law enforcement where necessary.”⁴⁹ Still exercising caution in the face of ambiguity, however, these policy documents warn military commanders not to plan missions or training “for the primary purpose of aiding civilian law enforcement officials” and not to conduct “training or missions for the purpose of routinely collecting information about U.S. citizens.”⁵⁰ In terms of equipment sharing, the both policy documents permit the DoN to “make equipment, base facilities, or research facilities” available to LE agencies to the extent that the sharing would not “adversely affect national security or military preparedness.”⁵¹ Only the Secretary of the Navy can approve the lending of DoD combat arms assets (e.g., ammunition, combat vehicles, vessels, and aircraft) to LE agencies.⁵²

Interpreting the PCA’s limits in a judicial vacuum, DoDD 5525.5 and SECNAVINST 5820.7c also permit direct assistance to LE agencies yet restrict military action that violates the

PCA's spirit. These Directives allow direct assistance to LE agencies "that [is] taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities."⁵³ Because this language is broad and flexible, however, the Directives caution commanders to avoid "actions taken for the primary purpose of aiding civilian LE officials or otherwise serving as a subterfuge to avoid the restrictions of [the PCA]."⁵⁴ Both documents also include approximately 27 other permissible direct assistance to LE activities, the majority of which coincide with a specified permission codified in U.S. statutes.⁵⁵ Most importantly though, regardless of the statutory exceptions to the PCA, both documents prohibit direct assistance to LE agencies in the form of vehicle, vessel, or aircraft interdictions; searches or seizures; arrests, apprehensions, stop-and-frisks, or similar activities; as well as the use of military personnel for surveillances, pursuits, and undercover operations.⁵⁶

V. The Appearance of an Inappropriate Domestic use of Military Authority.

Because the law and policy encompassing domestic operations is unclear, especially as applied to a Marine commander, this paper suggests that a final consideration in determining the scope of military support to LE agencies is whether the event creates the appearance of an inappropriate use of military authority in a domestic context. This principle, sometimes called in colloquial terms "the CNN effect," is neither a matter of law nor policy, but rather an ethical duty not to confuse the domestic population into believing that martial law exists at the expense of civil liberties. Indeed, it is unlikely that the U.S. military will in fact become the "tool for oppression" as those who are unfamiliar with military functionality might predict.⁵⁷ Additionally, while it is also true that history has either eroded the PCA or evidenced its inherent weakness, it is undeniable that public opinion drives political action, which in turn drives

legislation. In most instances, therefore, a commander would be imprudent to provide the public with the evidence necessary to suggest that a military unit usurped improper domestic authority. This notion implies that some operations, although permissible in law and policy, might challenge a commander to view the operation from a civilian bystander's standpoint.

VI. The Eroded PCA, Its Residue, and the Implication for Marine Commanders.

Court confusion and statutory and policy exceptions have therefore eroded the PCA into a symbolic gesture. As some scholars have suggested, "Contrary to years of tradition, the [PCA] is less like a roadblock than a speed bump between the Armed Forces and ever-increasing law enforcement roles."⁵⁸ In its modern context, the PCA exists at the top of convoluted and redundant mandates that have marginalized its relevance. After all the statutory and policy based erosion from the PCA's strict criminal liability language, one principle, however, resides: But for the narrow exception of presidentially directed insurrection operations, the U.S. military should not involve itself, or create the appearance of involving itself, in SSICA. As this paper has shown, statutory law has carved out exceptions to the PCA for direct military involvement in enforcement operations for various emergency and routine support scenarios. This paper has also shown that while the DoD and DoN have provided more specificity for statutorily permissible instances of direct assistance to LE agencies, they have additionally created Immediate Response and Emergency Response authorizations otherwise nonexistent in law. Moreover, because the DoJ has yet to indict a military commander of any service under the PCA, and because criminal liability with regard to Navy and Marine Corps commanders under the PCA, 10 U.S.C. § 375, or applicable military directives is questionable, this principle proscribing SSICA is de facto distilled into matter of military ethics. This military ethic therefore remains alone to guide commander faced with LE agency support circumstances that do not fit squarely

into statutory language or policy directives of domestic operational law. Additionally, because this principle might not be apparent in memorandums of understanding between commanders and LE agencies and implementation directives (as this paper will show in at least one instance below), commanders ought to be cognizant of this principle so not to chip away at civilian faith in the military.

VII. Application to Instances that Fall within the Seams of Law and Policy.

Since 2001, the intricacies of counter insurgency (COIN) operations have created the need for military personnel to use police-like tactics, techniques, and procedures in the combat environment. As a corollary, there is a rational utility and perhaps eagerness in conducting routine joint training and operations with LE agencies in order to harness and sharpen COIN skills. Training and operational opportunities with LE officials could include checkpoint operations, traffic control assistance, assistance for policing military personnel in a public forum, ride along programs, facility sharing, and military working dog (MWD) support.

Checkpoint operations with local LE officials can provide effective COIN training to the extent the checkpoints fairly replicate military checkpoints in a forward area of operations. However, the principles outlined in this paper suggest that involving military personnel at LE checkpoints would be impermissible under the PCA, 10 U.S.C. § 375, and their implementing policy directives. First, through a series of cases, the U.S. Supreme Court, after balancing the reasonable expectation of privacy guaranteed under the Constitution's Fourth Amendment against the need for public safety to determine the manner in which police may conduct checkpoints, has held that police checkpoints are in fact seizures within the meaning of the Constitution's Fourth Amendment.⁵⁹ Thus, whereas a commander, under the appropriate authorities, may provide equipment and equipment training in support of the LE checkpoint,

active military involvement in a police checkpoint operation would constitute a seizure proscribed under the PCA and its implementing laws and directives. Moreover, even if military personnel were to participate passively somehow at a LE checkpoint, stationing military personnel at a seizure location outside of federal jurisdiction would risk creating the appearance that military personnel are conducting inappropriate searches and seizures. Lastly, considering the inherent nature of a checkpoint situation, it is foreseeable an interdiction scenario might thrust itself upon military personnel, leading military personnel to unintended arrest and seizure circumstances. Even with the best intentions on behalf of military personnel, therefore, military involvement in an interdiction might create evidentiary troubles later at trial contrary to the government's interest.

The same principles apply to military traffic control assistance during an off-base incident with a military nexus. For instance, assume that a local LE official sought military support to control off-base traffic as a result of a vehicular accident near the base's gate. It is unrealistic in this case to sever inherent policing activities from controlling traffic because controlling traffic implies an ability to take lawful corrective action vis-à-vis vehicular disorder. In other words, if a vehicle were not to abide by the military personnel's traffic controls, military personnel likely have to interdict, arrest, and conduct a search incident to a lawful arrest. Military personnel might also under these circumstances foreseeable use force if reasonably necessary to control traffic. That these LE activities on behalf of military personnel are foreseeable upon scrutiny indicates how providing military personnel for even limited LE purposes might create, at the very least, the appearance of an impermissible use of military authority.

Would it be permissible for commanders to use Marines to patrol an off-base public event

so that local LE officials can deliver unruly military personnel to military authorities on site? Because no statute or directive specifically permits or restricts this action, one must evaluate this scenario broadly using the principles outlined in this paper. First, under Article 2 of the UCMJ, all “members of a regular component of the armed forces” are subject to the UCMJ regardless of geographic location.⁶⁰ In other words, UCMJ jurisdiction is predicated upon a servicemember’s status, not location. Accordingly, a commander may in most instances hold a servicemember under his command jurisdiction legally accountable for off-installation misconduct. This jurisdiction in effect allows military members to police one another off-installation, though they possess no jurisdiction to police civilians.

Second, because it is permissible for military commanders to police servicemembers under their command off-installation, this scenario, therefore, must be analyzed for the appearance of unlawful authority in a public forum. Assuming that the policing military personnel are uniformed, a potential exists for misleading civilians into believing that military personnel possess some broader form of search, seizure, interdiction, arrest, or use of force authority. Particularly, although military personnel in this instance have no intent to police civilians, the public cooperation with LE might create the appearance that military personnel are acting under some color of law that could affect civilians’ civil rights. It is additionally foreseeable under these circumstances that uniformed servicemembers might interdict a criminal matter thrust upon him. For example, assume that in response to a cry to catch a purse thief, a uniformed servicemember captured the thief and found some marijuana while searching for immediate weapons. Normally, these good-Samaritan actions would cause no evidentiary issues later at trial because, though not duty-bound, any person is generally permitted to interdict a crime occurring in his presence. However, because the servicemember in this scenario is

uniformed and acting in prior cooperation with LE officials, the line between good-Samaritan and unlawful civil use of military personnel blurs, thereby creating evidentiary issues for trial.

Third, this analysis might change were the military personnel to wear civilian clothes instead of uniforms. In this latter scenario, the appearance of inappropriate military authority vanishes because the Marines no longer identify themselves as acting in an official capacity, the Marines conduct no proscribed policing actions with regard to civilians, and the Marines are not positioned to react with questionable authority should an interdiction situation be thrust upon them. Thus, whereas using uniformed military personnel to “police their own” with police cooperation in a public event would be inappropriate, police delivery of unruly military personnel to plain-clothed Marines becomes solely a matter of police discretion.

Police “ride along” programs offer another opportunity for commanders to train and reward certain Marines. In these programs, Marines might learn through observation how police react to routine incidents, altercations, and opportunities and, accordingly, gain useful training for patrolling and de-escalation in a COIN environment. However, in terms of appearances, a savvy bystander might question circumstances where a police unit respond to a crime scene and conduct a seizure with military personnel in the patrol vehicle seemingly poised for interdiction. Although nothing in law or policy specifically permits ride along programs, opportunities to observe police conduct passively in a public forum would not likely constitute a search, seizure, or interdiction under any law, court ruling, or directive. Again, in order to avoid even the appearance of an inappropriate use of military authority, however, the Military participants should wear civilian attire.

Support requests from LE agencies for military working dogs (MWDs) present another instance where the permissible use parameters are unclear both in law and policy. Moreover, if

read out of context, implementation documents, such as Chief of Naval Operations Instruction OPNAVINST 5585.2b governing MWD employment and administration, provide guidance that might mislead a commander into impermissible actions. As discussed earlier, statutory law authorizes the SecDef to promulgate policy for equipment and personnel sharing but also sets forth different usage parameters for each category. Accordingly, it is first necessary to determine whether MWDs constitute equipment or personnel. Assuming that MWDs constitute equipment under the law because they are not people, providing MWDs without military handlers to LE officials for employment as well as training LE officials on MWD use would likely be permissible under 10 U.S.C § 372-373. However, employing MWDs without their military handlers is uncommon if not proscribed outright under OPNAVINST 5585.2B, which requires military handlers to have “unencumbered control over the detection support effort and complete access to the area to be ‘sniffed’” and to “[perform] the sole task of working his/her dog.”⁶¹ Therefore, because MWDs seldom separate from their military handlers, one must scrutinize how the rules regarding sharing military personnel with LE agencies affect the analysis.

At this point, the analysis for MWD support to LE agencies becomes complex because, whereas 10 U.S.C. § 374 might permit military personnel to operate the MWD shared permissibly with LE officials under 10 U.S.C. 372, it does not generally allow direct participation by MWD military handlers in LE operations. Therefore, the issue shifts to an analysis of the situations, other than training, that would be permissible under the law for MWD sharing. First, OPNAVINST narrows the scope of MWD support to LE agencies as a matter of policy by providing, “[Military Working Dogs] will only be used in their capacity as drug/explosive detector dogs. DDD/EDDs will not be used to conduct searches of individuals or to conduct crowd control operations.”⁶² Therefore, the next step in the analysis would be to

determine the legal and policy-based parameters for using MWD handlers to operate military equipment (i.e., MWDs) in drug and explosive detection situations.

Sharing explosive detection MWDs and their handlers with LE would likely be lawful because most explosive detections scenarios would fall under the foreign or domestic counter-terrorist operation exception under 10 U.S.C. § 374. In this case, the exception to the prohibition against using military personnel in searches is reasonable from a practical standpoint. Specifically, as a matter public interest, it is more important that LE finds bombs before they explode, hurt citizens, and destroy property than it is to catch and legally process the individual who planted the bomb. In other words, after balancing the interest for public safety in the face of a potential immediate threat against a violation of PCA principles, or the appearance thereof, lawmakers have opted for the former.

The analysis for the permissible use of drug detections dogs in support of LE officials is more complicated, however. First, MWD handlers may enforce federal controlled substance statutes to the extent that they are personnel permissibly operating shared equipment under 10 U.S.C. § 372. However, “operating” is a broader term than “searching,” so the analysis must deepen. Second, OPNAVINST 5585.2B directs local installation commanders to affirmatively provide Drug Detection Dog teams to local LE officials “upon receipt of a DDD request” as long as “the support is consistent with the installations’ mission requirements” and the command incurs no “substantial expense.”⁶³ Third, OPNAVINST 5585.2B restricts MWD involvement in searches of individuals, warrant-based searches, and arrests.⁶⁴ By deduction, these restrictions therefore imply that the OPNAVINST permits searches of chattel and property in situations commonly recognized in law as exceptions to constitutional prohibition against warrantless searches. Generally, such exceptions include open fields, instances of owner consent, certain

motor vehicles instances, government offices, and public schools.⁶⁵ Last, but most importantly, OPNAVINST 5585.2B warns MWD handlers not to take part in any activity that conflicts with its reference (k)—which is SECNAVINST 5820.7c.⁶⁶ In application, therefore, this provision indicates that military drug detection dogs and their handlers may not provide direct search assistance to LE officials.

VIII. Conclusion.

The PCA is statutory law untested in its powers for criminal liability. Criminal defendants have unsuccessfully called upon the courts to interpret the PCA as a rule to exclude evidence, and the courts are unclear about whether and to what extent the PCA applies to the DoN. Furthermore, although Congress, the DoD, and the DoN, have each touted the principle that the military shall not serve as domestic LE, they have also carved out numerous and sometimes-conflicting exceptions to this rule. Accordingly, it is false for a Marine commander to assume that joint operations with LE officials will criminalize him under PCA, and it is equally false for a Marine commander to assume that the PCA has no effect upon joint operations with LE officials. Marine commanders, therefore, must have a guiding principle for operational scenarios that do not fall squarely into the exceptions of the PCA. A holistic analysis of the PCA and its implementing statutes and directives evidence that military participation, or the appearance thereof, in SSICA is improper in a domestic context. However, because it is unlikely that a Marine commander would receive criminal liability for having violated either the PCA or its various implementing statutes and policies (especially as applied to the DoN), this principle in application is a matter of institutional norms more so than a matter of law. In other words, because a commander might be able to violate the PCA with impunity, the PCA's application is more realistically a matter of professional ethics than law.

Finally, commanders' training should touch upon the ethical limits of joint operations with LE. Because the overwhelming majority of Marine commanders at all levels are professionals of the truest quality, a commander's violations of the ethical principle outlined in this paper would likely be incidental. That is, ethical violations of this nature would not likely occur from instances of nefarious character, but instead from a commander's lack of understanding with regard to the ethical tie to joint operations with LE. Events such as commanders conferences and domestic operations conferences provide appropriate venues for this type of training. It is essential, though, that this concept (as with all ethical principles) is recognizable beyond subject-matter experts. In the end, commanders assume the ethical accountability for their unit.

¹ David B. Kopel and Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 Akron L. Rev. 619, 622 (1997).

² Kopel, 622.

³ Davies, 107

⁴ Kirk L. Davies, *The Imposition of Martial Law In The United States*, *The Air Force Law Review*, 49 A.F. L. Rev. 67, 108 (2000); Dan L. Burk and Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 Harv. J.L. & Tech. 41 (2001).

⁵ The term “law,” or “legal” in this paper implies a statutory or common law decree created by a rightful authority, such as Congress or a Court cognizant under Article III of the U.S. Constitution, interpreted through a court of competent jurisdiction, and enforced in a meaningful manner. “Policy,” as used in this paper, implies a mandate born from a non-punitive executive agency promulgation, such as a Department of Defense Directive or Instruction, the interpretation and enforcement of which occurs within the agency and is administrative in nature. Accordingly, policy breaches, after enforcement, do not result in criminal liability. Last, the term “ethics” or “ethical” implies institutional norms and criteria for appropriate action, especially in the face of impunity or a lack of redress. Ethical principles permit a decision maker to determine the proper course of action from an institutional standpoint, as opposed to a standpoint predicated on personal morality or legal repercussions.

⁶ 18 U.S.C. S. § 1385 (LexisNexis 2011) [United States Code Service].

⁷ *Wrynn v. United States*, 200 S. Supp. 457, 465 (E.D.N.Y. 1961).

⁸ In 1974, defendants before the U.S. Court of Appeals for the 4th Circuit sought to exclude testimonial evidence produced by Marines acting undercover for the Treasury Department, arguing that the Marines obtained the evidence in violation of the PCA. Despite determining that the Marines violated a Secretary of the Navy Instruction that incorporated the PCA, the court refused to exclude the evidence at issue, but commented that it retained the power to do so. *United States v. Walden*, 490 F.2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974); The U.S. Court of Appeals for the 9th Circuit refused in 1986 to apply the PCA as an exclusionary rule for evidence seized in its violation. *United States v. Roberts*, 779, F.2d 565 (9th Cir.), cert. denied, 479 U.S. 839, (1986); In 1989, the Washington Supreme Court refused to exclude evidence seized by Naval Investigative Service (NIS) allegedly seized in violation of the PCA. *State v. Short*, 113 Wash. 2d 35, (1989); Defendants before the 7th U.S. Circuit Court of Appeals in 1990 alleged that NIS violated the PCA when it seized evidence. The Court found, however, that NIS’s activities did not violate the law. *Hays v. Hawes*, 921 F.2d 100, 102-103 (7th Cir.1990); In 1991, the U.S. Court of Appeals for the District of Columbia Circuit held that hijackers of a Jordanian aircraft were not entitled to a dismissal or exclusion of evidence on the grounds that the Navy violated the PCA. The Court found that the Navy played only a passive role in law enforcement under the circumstances and ruled that the PCA and its implementing degrees do not offer an exclusionary rule of evidence. *United States v. Yunis*, 924 F.2d 1086, 1093-1094 (D.C. Cir. 1991).

⁹ 10 U.S.C.S. § 375 (LexisNexis 2011) [United States Code Service].

¹⁰ The U.S. Court of Appeals for the 4th Circuit ruled in 1974 that Congress’ failure to include the Navy in the PCA does not imply that Congress has approved of the use of Navy

personnel to enforce civilian laws. *United States v. Walden*, 490 F.2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974); In 1986, the U.S. Court of Appeals for the 9th Circuit refused to interpret the PCA beyond its plain language and extend the PCA to the Navy. *United States v. Roberts*, 779 F.2d 565 (9th Cir.), cert. denied, 479 U.S. 839, (1986); In 1989, the Washington Supreme Court refused to apply the PCA to the Navy. *State v. Short*, 113 Wash. 2d 35, (1989); Also in 1989, without addressing the matter as part of its holding, the U.S. Court of Appeals for the 11th Circuit commented in dicta that the “courts of appeal” have determined that the prohibitions embodied in the PCA apply to the Naval forces. *United States v. Ahumado-Avendano*, 872 F.2d 367 (11th Cir.), cert. denied 493 U.S. 830 (1989); In 1990, while determining in a habeas corpus petition whether Naval Investigative Services unlawfully seized evidence in a joint operation with local police, the 7th U.S. Circuit Court of Appeals, ruled that is unnecessary to determine whether the PCA applies to the DoN because 10 U.S.C. 375 and its implementing regulations “make the proscriptions of [the PCA] applicable to the Navy and serve to limit its involvement with civilian law enforcement officials.” Thus, according to the Court, the PCA is only relevant to the DoN inasmuch as it helps interpret 10 U.S.C. 375. *Hays v. Hawes*, 921 F.2d 100, 102-103 (7th Cir.1990); In 1991, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the PCA alone places no restrictions on the Navy’s participation in law enforcement operations in any case. *United States v. Yunis*, 924 F.2d 1086, 1093-1094 (D.C. Cir. 1991).

¹¹ Department of Defense Directive (DoDD) 5525.5, “DoD Cooperation with Civilian Law Enforcement Officials,” ¶ E4.3, January 15, 1986, <http://www.dtic.mil/whs/directives/corres/pdf/552505p.pdf>.

¹² Secretary of the Navy Instruction (SECNAVINST) 5820.7c, “Cooperation with Civilian Law Enforcement Officials,” ¶ 8(a), January 26, 2006, [http:// www.hqmc.usmc.mil/PP&O/PS/psl/corrections/References/5820.7C.pdf](http://www.hqmc.usmc.mil/PP&O/PS/psl/corrections/References/5820.7C.pdf).

¹³ 10 U.S.C.S. § 332 (LexisNexis 2011) [United States Code Service].

¹⁴ 10 U.S.C.S. § 333 (LexisNexis 2011) [United States Code Service].

¹⁵ William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 La. L. Rev 735 (2004).

¹⁶ 18 U.S.C.S. § 831(e) (1) (LexisNexis 2011) [United States Code Service].

¹⁷ 18 U.S.C.S. § 831(e) (2) (LexisNexis 2011) [United States Code Service].

¹⁸ 18 U.S.C.S. § 831(e) (1) (LexisNexis 2011) [United States Code Service].

¹⁹ 10 U.S.C.S. § 382 (LexisNexis 2011) [United States Code Service].

²⁰ 10 U.S.C.S. § 372(b) (LexisNexis 2011) [United States Code Service].

²¹ 18 U.S.C.S. § 832(c)(2) (LexisNexis 2011) [United States Code Service].

²² 42 U.S.C.S. § 5170b (LexisNexis 2011) [United States Code Service].

²³ 42 U.S.C.S. § 5170b(c) (LexisNexis 2011) [United States Code Service].

²⁴ 42 U.S.C.S. § 5170b(c) (LexisNexis 2011) [United States Code Service].

²⁵ Other permissible assistance under this section include making available DoD equipment, supplies, facilities, and personnel; distributing medicine and food indirectly through local governments or disaster assistance organizations; debris removal; search and rescue; emergency medical care and shelter; movement of persons; bridge construction; demolition of unsafe structures; information dissemination; and “reduction of immediate threats to life, property, and public health and safety.” 42 U.S.C.S. § 5170b(a) (LexisNexis 2011) [United States Code Service].

²⁶ Department of Defense Directive (DoDD) 3025.18, “Defense Support of Civil Authorities (DSCA),” ¶ 4(g), December 29, 2010, <http://www.dtic.mil/whs/directives/corres/pdf/302518p.pdf>.

²⁷ *Ibid.*

²⁸ DoDD 3025.18, ¶ 4(g)(2).

²⁹ DoDD 3025.18, ¶ 4(i).

³⁰ *Ibid.*

³¹ DoDD 3025.18, ¶ 4(j).

³² Department of Defense Directive (DoDD) 3025.12, “Military Assistance for Civil Disturbances (MACDIS),” ¶ E2.1.5, February 4, 1994, <http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf>.

³³ DoDD 3025.12, ¶ 4.1.3.

³⁴ DoDD 3025.12, ¶ 4.2.2.1.

³⁵ DoDD 3025.12, ¶ 4.8.2.2.

³⁶ Banks, 751.

³⁷ 10 U.S.C.S. § 371 (LexisNexis 2011) [United States Code Service].

³⁸ 10 U.S.C.S. § 371(b), (c) (LexisNexis 2011) [United States Code Service].

³⁹ 10 U.S.C.S. § 372(a) (LexisNexis 2011) [United States Code Service].

⁴⁰ *Ibid.*

⁴¹ 10 U.S.C.S. § 373 (LexisNexis 2011) [United States Code Service].

⁴² 10 U.S.C.S. § 374 (LexisNexis 2011) [United States Code Service].

⁴³ *Ibid.*

⁴⁴ Permissible circumstances to operate LE equipment also include suspected terrorist rendition from a foreign country to the U.S. to stand trial, enforcement of certain Immigration and Nationality Act provisions, enforcement of certain Tariff Act of 1930 provisions, and assisting federal LE agencies in their assistance to other state or foreign governments with regard to similar missions. *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ DoDD 5525.5, ¶ E4.3.

⁴⁸ DoDD 5525.5, ¶ 4; SECNAVINST 5820.7c, ¶ 4.

⁴⁹ DoDD 5525.5, ¶ E2.14; SECNAVINST 5820.7c, ¶ 4.

⁵⁰ *Ibid.*; SECNAVINST 5820.7c, ¶ 5(b).

⁵¹ DoDD 5525.5, ¶ E3.2.2.; SECNAVINST 5820.7c, ¶ 6(a).

⁵² DoDD 5525.5, ¶ E3.4.3.1.

⁵³ DoDD 5525.5, ¶ E4.1.2.1.

⁵⁴ DoDD 5525.5, ¶ E4.1.2.1.

⁵⁵ Other permissible direct assistance to LE activities include investigations related to UCMJ enforcement, DoD administrative proceedings, and a “commander’s inherent authority to maintain law and order on a military installation or facility”; protection of DoD personnel, equipment, or classified information; and, in unusual circumstances during extreme calamities, to carry out governmental operations to preserve public order after an “emergency authority” orders federal action to prevent loss of life or wanton destruction of property.⁵⁵ DoDD 5525.5, ¶ E4.1.2.3.

⁵⁶ DoDD 5525.5, ¶ E4.1.3.

⁵⁷ Michael T. Cunningham, *The Military's Involvement in Law Enforcement: The Threat Is Not What You Think*, 26 Seattle Univ. L.R. 699 (2003).

⁵⁸ Davies, 108.

⁵⁹ City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

⁶⁰ 10 U.S.C.S. § 802 (LexisNexis 2011) [United States Code Service].

⁶¹ Chief of Naval Operations Instruction (OPNAVINST) 5585.2b, ¶ 9-7(a)(b), August 25, 1997, <http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-500%20Security%20Services/5585.2B.pdf>.

⁶² OPNAVINST 5585.2b, ¶ 9-7(e).

⁶³ OPNAVINST 5585.2b, ¶ 9-3(c)(1).

⁶⁴ OPNAVINST 5585.2b, ¶ 9-7(j).

⁶⁵ Oliver v. United States, 466 U.S. 170 (1924); Arizona v. Gant, 129 S. Ct. 1710 (2009); United States v. Montoya de Hernandez, 473 U.S. 531 (1985); New Jersey v. T.L.O., 469 U.S. 325 (1985); Samson v. California, 547 U.S. 843 (2006).

⁶⁶ OPNAVINST 5585.2b, ¶ 9-7(f).

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