

International and Operational Law Department
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DOMESTIC SUPPORT OPERATIONS

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REFERENCES

1. 18 U.S.C. § 1385, Posse Comitatus Act.
2. 10 U.S.C. §§ 371-382, Chapter 18, Military Support For Civilian Law Enforcement Agencies.
3. 10 U.S.C. §§ 331-334, Chapter 15, Insurrections
4. 32 U.S.C. § 112, Drug Interdiction and Counter-Drug Activities
5. 42 U.S.C. § 5121, et seq., as amended, Stafford Act
6. 50 U.S.C. § 2311, Response to Threats of Terrorist Use of Weapons of Mass Destruction
7. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1004, as amended, Additional Support for Counter-Drug Activities
8. National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, Section 1031, as amended, Authority to Provide Additional Support for Counter-Drug Activities of Mexico
9. National Defense Authorization Act for Fiscal Year 1998, P.L. 105-85, Section 1033, Authority to provide Additional Support for Counter-Drug Activities of Peru and Colombia
10. DoDD 3025.15, *Military Assistance to Civil Authorities*, 18 February 1997
11. DoDD. 3025.1, *Military Support to Civil Authorities*, 15 January 1993.
12. DoD 3025.1M, *Manual for Civil Emergencies*, June 1994.
13. DoDD. 3025.12, *Military Assistance for Civil Disturbances*, 4 February 1994.
14. DoDD. 5525.5, *DoD Cooperation With Civilian Law Enforcement Officials (w/change one)*, 21 February 1986.
15. DoDD 5525.10, *Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions*, 17 September 1990
16. NGR 500-1/ ANGI 10-8101, *Military Support to Civil Authorities*, February 1996
17. NGB 500-2/ ANGI 10-801, *National Guard Counterdrug Support to Law Enforcement Agencies*, September 1993
18. CJCS Instruction 3710.01, *Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DoD Personnel*, 28 May 1993.
19. AR 500-51, *Support to Civilian Law Enforcement*, 1 August 1983.
20. AR 700-131, *Loan and Lease of Army Material*, 4 September 1987
21. SECNAVINST 5820.7B, *Cooperation With Civilian Law Enforcement Officials*, 28 March 1988
22. OPNAVINST 3440.1C, *Navy Civil Emergency Management Program*, 10 March 1995
23. AFI 10-801, *Air Force Assistance to Civilian Law Enforcement Agencies*, 15 April 1994.
24. AFI 10-802, *Military Support to Civil Authorities*, 23 February 1994
25. AFI 31-202, *Military Working Dog Program*, 1 August 1996
26. DoD Civil Disturbance Plan GARDEN PLOT
27. FM 100-19, *Domestic Support Operations*, July 1993.
28. Office of the Defense Coordinator for Drug Enforcement Policy and Support Policy of 26 Jan 95, *Priorities, Policies, and Procedures for Department of Defense Counterdrug Support to Domestic Drug Law Enforcement Agencies*.
29. National Security Act of 1947, 50 U.S.C. § 401 et seq.

30. Title V of the National Security Act of 1947, 50 U.S.C. § 413.
31. Executive Order 12333, *United States Intelligence Activities*, 4 Dec 4 1981, 46 Fed.Reg. 59941.
32. DoDD 5240.1, *DoD Intelligence Activities*, (25 Apr 1988)
33. DoD 5240.1-R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons* (7 Dec 1982).
34. AR 381-10, *U.S. Army Intelligence Activities* (1 Jul 84).
35. AFI 14-104, *Conduct of Intelligence Activities* (1 Nov 93)
36. SECNAVINST 3820.3D, *Oversight of Intelligence Activities within the Department of the Navy* (26 Aug 88)
37. DIA, *Intelligence Law Handbook* (Sept. 1995) [hereinafter ILH].
38. USAINSCOM Pamphlet 27-1, *Intelligence Law Handbook*, 31 Jan 86.

I. OBJECTIVES

- A. Become familiar with DoD's role overall in domestic operations.
- B. Become familiar with the Posse Comitatus Act.
- C. Become familiar with DoD's role in disasters and emergencies.
- D. Become familiar with DoD's role in civil disturbances.
- E. Become familiar with DoD's role in providing support to law enforcement.
- F. Become familiar with DoD's role in counterdrug support.
- G. Become familiar with limitations on DoD's role in collecting intelligence concerning U.S. personnel.

II. OVERVIEW

- A. General: The military's mission is to fight and win the nation's wars. DoD will cooperate with civil authorities, but the relationship is generally one of support—the civilian authorities retain primary responsibility.
- B. Starting point for all DoD support: DoDD 3025.15.

- C. Limitations on provision of support imposed by the Posse Comitatus Act, 18 U.S.C. § 1385.

- D. Allowable military support to domestic operations.
 - 1. Civil disasters and emergencies; Stafford Act (42 U.S.C. §§ 5121, et.seq.), DoDD 3025.1;

 - 2. Civil disturbances; Insurrection Act (10 U.S.C. §§ 331-34), DoDD 3025.12;

 - 3. Support to civilian law enforcement
 - a. Loan of equipment; 10 U.S.C. § 372, DoDD 5525.5;

 - b. Expert advice and training; 10 U.S.C. § 373, DoDD 5525.5;

 - c. Sharing information; 10 U.S.C. § 371, DoDD 5525.5

 - 4. Counterdrug support
 - a. Detection and monitoring; 10 U.S.C. § 124;

 - b. Training and other support; Section 1004, FY 91 NDAA; CJCSI 3710.01.

 - 5. Miscellaneous support
 - a. Sensitive support; DoDD S-5210-36;

 - b. Law enforcement detachments; 10 U.S.C. § 379;

 - c. Emergencies involving chemical or biological weapons; 10 U.S.C. § 382;

- d. Miscellaneous exceptions.

III. GUIDE FOR PRACTICE

- A. Respond to situations requiring immediate action to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions. Notify the appropriate approval authority as soon as possible.
- B. Consult DoDD 3025.15.
 - 1. Review the 6 criteria for support: legality, lethality, risk, cost, appropriateness, and readiness.
 - 2. Note that SECDEF has, in certain circumstances, changed the approval authority (i.e., he has reserved the authority to himself).
- C. Consult the appropriate DoD/Service regulation.
- D. Find and forward the requests to the appropriate approval authority.
- E. Remember the fiscal implications: most support is reimbursable, so ensure costs are captured.

IV. DODD 3025.15

- A. Governs all DoD military assistance provided to civil authorities within the 50 States, District of Columbia, Puerto Rico, U.S. possessions and territories.
- B. Provides criteria against which all requests for support shall be evaluated. The directive addresses them to approval authorities, but commanders at all levels should use them in providing a recommendation up the chain of command.
 - 1. Legality - compliance with the law.
 - 2. Lethality - potential use of lethal force by or against DoD forces.

3. Risk - safety of DoD forces.
 4. Cost - who pays, impact on DoD budget.
 5. Appropriateness - whether the requested mission is in the interest of DoD to conduct.
 6. Readiness - impact on DoD's ability to perform its primary mission.
- C. Approval Authority. The directive changes the approval authority, in certain cases, from that set forth in older directives, but the older directives have not been changed and are otherwise applicable.
1. SECDEF is the approval authority for:
 - a. Civil Disturbances.
 - b. Responses to acts of terrorism.
 - c. Support that will result in a planned event with the potential for confrontation with specifically identified individuals or groups, or which will result in the use of lethal force.
 2. When CINC-assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff. CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected CINC.
 3. Immediate response authority in the local commander is not affected.

V. POSSE COMITATUS ACT

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both. 18 U.S.C. § 1385.

A. History.

1. posse comitatus *po.si komitei.tAs, -tius*, [med. (Anglo) L., force of the county: see prec. and county.] ‘The force of the county’; the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or ‘raise’ to repress a riot or for other purposes; also, a body of men actually so raised and commanded by the sheriff. Oxford English Dictionary Online.
2. In the United States the posse comitatus was perhaps most important on the Western frontier (there known as a posse), but it has been preserved as an institution in many states. Sheriffs and other peace officers have the authority to summon the power of the county. In some counties it is a crime to refuse assistance. In general, members of a posse comitatus have been permitted to use force if necessary to achieve a posse’s legitimate ends, but state laws differ as to the legal liability of one who in good faith aids an officer himself acting beyond his authority. “posse comitatus” Britannica Online.
3. Congress sought to terminate the prevalent use of federal soldiers in civilian law enforcement roles in the South during the Reconstruction Period following the Civil War.
4. Act of 1878 created general prohibition against use of military personnel in civilian law enforcement.
5. Sought to preserve American tradition of military subordination to a strong civil authority.

B. To Whom the PCA Applies.

1. Active duty personnel in the Army and Air Force.
 - a. Most courts interpreting the Posse Comitatus Act have refused to extend its terms to the Navy and Marine Corps. (United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied*, 479 U.S. 839 (1986); United States v. Mendoza-Cecelia, 736 F.2d. 1467 (11th Cir. 1992)).

b. 10 U.S.C. § 375 directed SECDEF to promulgate regulations forbidding direct participation "by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity." SECDEF has done so in DoDD 5525.5. Therefore, the proscription has been extended by regulation to the Navy and Marine Corps. (See DoDD 5525.5, para. B(1), and enclosure 4, para C.). SECDEF and SECNAV may grant exceptions on a case by case basis. DoDD 5525.5, Encl. 4, para. C., SECNAVINST 5820.7b, para. 9c.

2. Reservists on active duty, active duty for training, or inactive duty for training.
3. National Guard personnel in Federal service (Title 10 status).
4. Civilian employees of DoD when under the direct command and control of a military officer. (DoDD 5525.5, encl. 4; AR 500-51, para. 3-2; SECNAVINST 5820.7B, para. 9b(3)).

C. The Whom the PCA does NOT Apply:

1. A member of a military service when off duty and acting in a private capacity. [A member is not acting in a private capacity when assistance to law enforcement officials is rendered under the direction or control of DoD authorities]. (DoDD 5525.5, Encl. 4; AR 500-51 para. 3.2; SECNAVINST 5820.7B, para. 9b(4)); AFI 10-801.
2. A Member of the National Guard when not in Federal Service.
3. A member of a Reserve Component when not on active duty, active duty for training, or inactive duty for training.
4. Members of the Coast Guard during peacetime (14 U.S.C. § 2). Jackson v. Alaska, 572 P.2d 87 (Alaska 1977).

D. To What the PCA Applies.

1. Prohibits direct law enforcement assistance, including:

- a. Interdiction of a vehicle, vessel, aircraft, or other similar activity;
 - b. A search or seizure;
 - c. An arrest, apprehension, stop and frisk, or similar activity; and
 - d. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators. DoDD 5525.5, Encl. 4, para. A.3.
2. Analytical framework. There are three separate tests which courts apply to determine whether the use of military personnel has violated the PCA.
- a. FIRST TEST: whether the action of the military personnel was “active” or “passive.” United States v. Red Feather, 392 F. Supp. 916, at 921 (W.D.S.D 1975); United States v. Yunis, 681 F. Supp. 891, at 892 (D.D.C. 1988); United States v. Rasheed, 802 F.Supp. 312 (D. Hawaii 1992).
 - b. SECOND TEST: whether use of the armed forces pervaded the activities of civilian law enforcement officials. United States v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982) *cert. den.* 459 U.S. 1170 (1983); United States v. Hartley, 796 F.2d 112 (5th Cir. 1986); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990);.
 - c. THIRD TEST: whether the military personnel subjected citizens to the exercise of military power which was:
 - (1) Regulatory (a power regulatory in nature is one which controls or directs);
 - (2) Proscriptive (a power proscriptive in nature is one that prohibits or condemns); or

- (3) Compulsory (a power compulsory in nature is one that exerts some coercive force). United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975); United States v. Casper, 541 F.2d 1274 (8th Cir. 1976), *cert. denied*, 30 U.S. 970 (1977). United States v. Yunis, 681 F. Supp. 891, at 895-6 (D.D.C. 1988); United States v. Kahn, 35 F.3d 426 (9th Cir. 1994).
3. The PCA does NOT apply to actions furthering a military or foreign affairs function of the United States. This is sometimes known as the “Military Purpose Doctrine.” The primary purpose must be to further the military interest. The civilians may receive an incidental benefit. DoDD 5525.5, Encl. 4, para. A.2.a. Such military purposes include:
 - (1) Investigations and other actions related to enforcement of the UCMJ. United States v. Thompson, 33 M.J. 218 (CMA 1991), *cert. denied*. 502 U.S. 1074 (1992).
 - (2) Investigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding.
 - (3) Investigations and other actions related to the commander’s inherent authority to maintain law and order on a military installation or facility. Harker v. State, 663 P.2d 932 (Alaska 1983); Anchorage v. King, 754 P.2d 283 (Alaska Ct. App. 1988); Eggleston v. Department of Revenue, 895 P.2d 1169 (Colo. App 1995). Civilians may be detained for an on-base violation long enough to determine whether the civilian authorities are interested in assuming the prosecution. Applewhite v. United States, 995 F.2d 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994).
 - (4) Protection of classified military information or equipment.
 - (5) Protection of DoD personnel, DoD equipment, and official guests of the DoD.
 - (6) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

E. Where the PCA Applies. (Extraterritorial Effect of the PCA)

1. A 1989 DOJ Office of Legal Counsel opinion concluded that the Posse Comitatus Act does not have extraterritorial application. Memorandum, Off. Legal Counsel for General Brent Scowcroft, 3 Nov. 1989. This opinion also states the restrictions of 10 U.S.C. §§ 371 - 381, specifically 10 U.S.C. § 375, were also not intended to have extraterritorial effect. *Id.* at 21.
2. Some courts have also adopted the view that the Posse Comitatus Act imposes no restriction on use of U.S. armed forces abroad, noting that Congress intended to preclude military intervention in domestic affairs. United States v. Cotton, 471 F.2d 744 (9th Cir. 1973); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). (Note: both Chandler and D'Aquino involved law enforcement in an area of military occupation.) But see, United States v. Kahn, 35 F.3d 426, 431 n. 6 (9th Cir. 1994) (In a case involving the applicability of the PCA to Navy activities in support of maritime interdiction of a drug-smuggling ship, the government maintained the PCA had no extraterritorial effect. While the court stated that issue had not been definitively resolved, it did state that 10 U.S.C. §§ 371-381 did “impose limits on the use of American armed forces abroad.”)
3. Note, however, that DoD policy, as contained in DoDD 5525.5, which incorporates restrictions of 10 U.S.C. § 375, applies to all U.S. forces wherever they may be. Two weeks after the promulgation of the Barr memo, Secretary Cheney amended the Directive to read that, in the case of compelling and extraordinary circumstances, SECDEF may consider exceptions to the prohibition against direct military assistance with regard to military actions outside the territorial jurisdiction of the U.S..

F. What is the effect of violating the PCA.

1. Criminal Sanctions. 2 years imprisonment, fine, or both.
2. Inability to Convict Offenders:
 - a. Exclusionary rule. In general, courts have not applied the exclusionary rule to cases in which the PCA was violated, using the following rationales:

- (1) The PCA is itself a criminal statute, so there is no need to use the deterrent of the exclusionary rule. However, since there have been no prosecutions under the PCA, its deterrent effect is questionable. State v. Pattioay, 896 P.2d 911 (Hawaii 1995); Colorado v. Tyler, 854 P.2d 1366 (Colo. Ct. App. 1993), *rev'd on other grounds*, 874 P.2d 1037 (Colo. 1994); Taylor v. State, 645 P.2d 522 (Okla. 1982).
 - (2) The PCA is designed to protect the rights of all civilians, not the personal rights of the defendant. United States v. Walden, 490 F.2d 372 (4th Cir. 1974), *cert. denied* 416 U.S. 983 (1974).
 - (3) Violations of the PCA are neither widespread nor repeated, so the remedy of the exclusionary rule is not needed. Court will apply the exclusionary rule when the need to deter future violations is demonstrated. United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied* 479 U.S. 839 (1986); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979).
- b. Failure to prove an element of offense. Where the offense requires that law enforcement officials act lawfully, violation of the PCA would negate that element. United States v. Banks, 383 F. Supp. 368 (1974).
3. Dismissal of charges. Not likely to be considered an appropriate remedy. United States v. Rasheed, 802 F. Supp 312 (D. Hawaii 1992).
 4. Civil Liability.
 - a. PCA violation as a private cause of action: No. PCA is a criminal statute; Congress did not intend to create a private cause of action. Robinson v. Overseas Military Sales Corp., 21 F. 3d 502, 511 (2nd Cir. 1994) *citing* Lamont v. Haig, 539 F. Supp. 552 (W.D.S.D. 1982).

- b. PCA violation as a constitutional tort (“Bivens suit”): An evolving area. Applewhite v. United States Air Force, 995 F.2d 997 (10th Cir. 1993)(finding PCA not violated, and conduct of military personnel did not otherwise violate 4th or 5th Amendment rights); Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986)(finding a private right of action under the 4th Amendment).
- c. Federal Tort Claims Act: Military personnel acting in violation of the PCA may not be found to be acting “within the scope of their employment,” and therefore may be subject to individual personal liability. Wrynn v. U.S., 200 F. Supp. 457 (E.D.N.Y. 1961).

VI. DISASTER & EMERGENCY RELIEF

A. References.

- 1. Law: Disaster Relief Statutes (Stafford Act), 42 U.S.C. §§ 5121, et seq.
- 2. DoD.
 - a. DoDD 3025.1, DoD 3025.1-M.
 - b. NGR 500-1/ANGI 10-8101.
- 3. Services.
 - a. AR 500-60.
 - b. OPNAVINST 3440.1C.
 - c. AFI 10-802.

- B. Stafford Act. Provides four means by which the federal government may become involved in the relief effort:

1. President may declare the area a major disaster (42 U.S.C. § 5170).
 - a. Follows a natural catastrophe.
 - b. Requires a request for the declaration from the governor.
 - c. State must have executed its own emergency plan and require supplemental help.
2. President may declare the area an emergency (42 U.S.C. § 5191).
 - a. Same criteria as for a major disaster, except also requires that governor define the type and amount of federal aid required. Total federal assistance may not exceed \$5 million.
 - b. Operationally, no significant distinction between an emergency and a major disaster.
3. President may send in DoD assets on an emergency basis to “preserve life and property.” 42 U.S.C. § 5170b(c).
 - a. Done before any Presidential declaration, but still requires a governor’s request.
 - b. Lasts only 10 days.
 - c. Used to clear debris and wreckage and to temporarily restore essential public facilities and services—very limited authority.
4. President may send in federal assets where an emergency occurs in an area over which the federal government exercises primary responsibility by virtue of the Constitution or federal statute. 42 U.S.C. § 5191(b).
 - a. Does not require a governor’s request, although the statute directs consultation with the governor, if practicable.
 - b. Results in a Presidential declaration of an emergency.

- c. President Clinton exercised this authority on April 19, 1995 in the case of the bombing of the Murrah Federal Building in Oklahoma City, OK.

C. The Federal Response.

1. The Federal Emergency Management Agency (FEMA) directs and coordinates the federal response on behalf of the President.
2. FEMA has prepared the *Federal Response Plan*, which defines 12 Emergency Support Functions (ESF's) for which certain federal agencies have either a primary or supporting role. DoD (Corps of Engineers) is the primary agency for ESF #3, Public Works and Engineering. DoD is a supporting agency for all others.
3. FEMA appoints a Federal Coordinating Officer (FCO), typically the senior FEMA official on-scene.
4. Because of the likelihood of DoD involvement, a Defense Coordinating Officer (DCO) is assigned to the FCO. The DCO, an O-6 or above, is generally drawn from the CONUSA headquarters. The DCO will be the FCO's single point of contact for DoD support.
5. The FCO issues Mission Assignments, defining the task and maximum reimbursement amount, to the federal agencies. Federal agencies that exceed the reimbursement amount, or execute tasks not within the Mission Assignment, may not be reimbursed.

D. The DoD Response.

1. The Secretary of the Army is the DoD Executive Agent for disaster relief operations. As such, he is the approval authority for all such support, unless it involves CINC-assigned forces (see discussion of DoDD 3025.15, above).
2. The Director of Military Support (DOMS) is the Secretary of the Army's action agent. DOMS coordinates and monitors the DoD effort.

3. USACOM (CONUS, Puerto Rico, and the Virgin Islands) and USPACOM (Alaska, Hawaii, and Pacific possessions and territories) are responsible for developing disaster response plan and for the execution of those plans. They may form a Joint Task Force for this purpose.

E. Immediate Response Authority.

1. Authorizes local military commanders to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions when time does not permit approval from higher headquarters.
2. Types of support authorized include:
 - a. Rescue, evacuation, and emergency treatment of casualties.
 - b. Emergency restoration of essential public services.
 - c. Emergency removal of debris and explosive ordnance.
 - d. Recovery and disposal of the dead.
3. This type of support is provided on a reimbursable basis, but assistance should not be denied because the requester is unable or unwilling to commit to reimbursement.
4. NOTE: This is a very limited authority that should only be invoked in bona fide emergencies. Contemporaneous coordination with DOMS should always occur in these scenarios, and in any other case potentially involving this type of assistance to civil authorities.

F. Disaster Support Involving Law Enforcement Activities.

1. The Stafford Act is not an exception to the Posse Comitatus Act. Therefore, any support that involves direct involvement in the enforcement of the civil law must undergo the PCA analysis discussed below. Typical areas of concern include:
 - a. Directing traffic.

- b. Guarding supply depots.
 - c. Patrolling.
- 2. National Guard personnel, acting in their Title 32 (State) status should be the force of choice in these areas.
- 3. Law enforcement duties that involve military functions may be permissible (i.e., guarding a military supply depot).

VII. CIVIL DISTURBANCES

A. References.

- 1. Constitution: Article 4, Section 4: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”
- 2. Law: Insurrections, 10 U.S.C. §§ 331-335.
- 3. DoD.
 - a. DoDD 3025.12.
 - b. DoD Civil Disturbance Plan GARDEN PLOT.

B. The maintenance of law and order is primarily vested in state and local officials. Involvement of military forces will only be appropriate in extraordinary circumstances. Use of the military under these authorities to conduct law enforcement activities is a specific exception to the PCA. The probable order of employment of forces in response to a certain situation will be:

- 1. Local and state police.

2. National Guard in their state status.
 3. Federal civil law enforcement officials.
 4. Federal military troops (to include National Guard called to active federal service).
- C. The insurrection statutes permit the President to use the armed forces to in the following circumstances:
1. An insurrection within a State. The legislature or governor must request assistance from the President. § 331.
 2. A rebellion making it impracticable to enforce the laws of the United States (i.e., federal law) by the ordinary course of judicial proceedings. § 332.
 3. Any insurrection or domestic violence which:
 - a. opposes or obstructs federal law; or
 - b. hinders the execution of State law so that the people are deprived of their Constitutional rights, and the State is unable or unwilling to protect those rights. § 333.
- D. The Federal response.
1. The Attorney General coordinates all federal government activities relating to civil disturbances.
 2. If the President decides to respond to the situation, he must first issue a proclamation to the insurgents, prepared by the Attorney General, directing them to disperse within a limited time. § 334. At the end of that time period, the President may issue an execute order directing the use of armed forces.
 3. The Attorney General appoints a Senior Civilian Representative of the Attorney General (SCRAG) as his action agent.

E. The DoD Response.

1. SECDEF has reserved to himself the authority to approve support in response to civil disturbances (DoDD 3025.15). The Secretary of the Army had previously been the approval authority (DoDD 3025.12)
2. Although the civilian authorities have the primary responsibility for response to civil disturbances, military forces shall remain under military command and control at all times.
3. The Secretary of the Army, along with DOMS, in coordination with CJCS, directs the required DoD assistance, normally by designating supported and supporting CINC's.
4. GARDEN PLOT is the standing Operation Plan for response to civil disturbance. It is a comprehensive plan. Detailed Use of Force Policy / ROE is found in Appendix 8 to Annex C.

F. Emergency Employment of Military Forces.

1. Military forces shall not be used for civil disturbances unless specifically directed by the President (pursuant to 10 U.S.C. §§ 331-334), except in the following circumstances:
 - a. To prevent the loss of life or wanton destruction of property or to restore governmental functioning, in cases of civil disturbances, if the duly constituted authority local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization.
 - b. When duly constituted state or local authorities are unable or decline to provide adequate protection for Federal property or functions.
2. Note that this is limited authority.

- G. Other Considerations. Although employment under these authorities permits direct enforcement of the law by military forces, the military's role in law enforcement should be minimized as much as possible. Our role is to support the civilian authorities, not replace them. Civilian authorities have more experience in law enforcement than does the typical service member.

VIII. SUPPORT TO CIVILIAN LAW ENFORCEMENT

- A. Although the following activities can be considered law enforcement type activities, they do not violate the PCA as they do not involve use of military personnel to provide direct assistance.
- B. Loan of Equipment and Facilities.
 - 1. References.
 - a. Law: 10 U.S.C. § 372, § 374.
 - b. DoD.
 - (1) DoDD 5525.5, Enclosure 3.
 - (2) NGB 500-1/ANGI 10-8101.
 - c. Services.
 - (1) AR 500-51, Chapter 2, Section 2.
 - (2) SECNAVINST 5820.7B, para. 8.
 - (3) AFI 10-801, Attachment 4.
 - 2. With proper approval, DoD activities may make equipment (including associated supplies and spare parts), base facilities, or research facilities available to Federal, State, or local law enforcement officials for law enforcement purposes.

3. There must be no adverse impact on national security or military preparedness.
4. Approval authority.
 - a. SECDEF. Any requests for potentially lethal support, including loans of:
 - (1) Arms.
 - (2) Combat and tactical vehicles, vessels, or aircraft.
 - (3) Ammunition.
 - b. Army:
 - (1) HQDA (DALO-SMS). Non-lethal equipment in excess of 60 days. Installation Commander can approve all other equipment requests if loan/lease is for 60 days or less.
 - (2) HQDA (DAMO-ODS). Requests for use of installation or research facilities. AR 500-51, para. 2-5.
 - c. Navy & Marines: Assistant SECNAV (Manpower and Reserve Affairs) for non-lethal equipment for more than 60 days. All other requests may be approved as specified in SECNAVINST 5820.7B, para. 9e(3).
 - d. Air Force: Ass't SECAF for Manpower, Reserve Affairs, Installations, and Environment for all nondrug related requests. See AFI 10-801, Attachment 4.
 - e. National Guard: Loan of weapons, combat/tactical vehicles, vessels and aircraft require approval of the service secretary or their designee. Requests for loan/lease of NG equipment that require HQDA or HQAF approval will be reviewed by NGB. NGB 500-1/ANGI 10-8101, para. 3-1.

5. In addition to loan/lease authority, The National Defense Authorization Act of 1997 added a new section to Title 10. Section 2576a, "Excess Personal Property; Sale or Donation for law enforcement activities," permits DoD to provide excess personal property suitable for use in counter-drug and counter-terrorism activities to federal and state agencies.
 - a. This includes authority to furnish small arms and ammunition.
 - b. The Defense Logistic Agency manages this program as of 1 October 1995. Memorandum of the Secretary of Defense for the Under Secretary of Defense for Acquisition and Technology, 26 June 1995.
 - c. The four Regional Logistics Support Offices (Buffalo, Miami, El Paso, Los Angeles) actually provide this excess property.

C. Expert Advice and Training.

1. References.
 - a. Law.
 - (1) 10 U.S.C. §§ 373, 375, 377.
 - (2) 50 U.S.C. §§ 2312, 2315.
 - b. DoD: DoDD 5525.5, Enclosure 4.
 - c. Services.
 - (1) AR 500-51, Chapter 3.
 - (2) SECNAVINST 5820.7B, para. 9.a.(4) and (5).
 - (3) AFI 10-801.

2. Military personnel may be used to train civilian law enforcement personnel in the use of equipment that we provide. Large scale or elaborate training programs are prohibited, as is regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations.
 - a. Note that the Deputy Secretary of Defense has provided policy guidance in this area, which limits the types of training US forces may provide. The policy is based on prudential concerns that advanced training could be misapplied or misused by CLEAs, resulting in death or injury to non-hostile persons. The memo permits basic military training such as basic marksmanship, patrolling, medical/combat lifesaver, mission planning, and survival skills. It prohibits what it terms “advance military training,” which is defined as “high intensity training which focuses on the tactics, techniques, and procedures (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists.” Examples of such training are sniper training, Military Operations in Urban Terrain (MOUT), Advanced MOUT, and Close Quarter Battle/Close Quarter Combat (CQB/CQC) training.
 - b. A single general exception exists to provide this advanced training at the US Army Military Police School. In addition, USCINCSOC may approve this training, on an exceptional basis, by special operations forces personnel.
3. Military personnel may also be called upon to provide expert advice to civilian law enforcement personnel. However, regular or direct involvement in activities that are fundamentally civilian law enforcement operations is prohibited.
 - a. A specific example of this type of support is military working dog team support to civilian law enforcement. The dogs have been analogized to equipment and its handler provides expert advice. See DoDD 5525.10, Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions, 17 Sept. 1990; Military Working Dog Program, AFI 31-202.

b. Weapons of Mass Destruction. Congress has directed that DoD provide certain expert advice to federal, state, and local agencies with regard to weapons of mass destruction (WMD). This training is non-reimbursable because Congress has appropriated specific funds for these purposes.

(1) 50 U.S.C. § 2312: Training in emergency response to the use or threat of use of WMD.

(2) 50 U.S.C. § 2315: Program of testing and improving the response of civil agencies to biological and chemical emergencies. (Department of Energy runs the program for responses to nuclear emergencies.)

4. Approval Authority.

a. SECDEF.

(1) Training or expert advice to law enforcement in which there is a potential for confrontation between the trained law enforcement and specifically identified civilian individuals or groups.

(2) Assignments of 50 or more DoD personnel or a period of assignment of more than 30 days. The Assistance Secretary of Defense (Manpower, Reserve Affairs, and Logistics) is the approval authority for any other assignment.

b. Army. DOMS is the approval authority. AR 500-51, para. 3-1d.

c. Navy & Marines. The Secretary of the Navy is the approval authority. SECNAVINST 5820.7B, para. 9.e.

5. Funding. Support provided under these authorities are reimbursable, unless:

a. The support is provided in the normal course of training or operations; or

- b. The support results in a substantially equivalent training value.

D. Sharing Information.

- a. References.

- (1) Law: 10 U.S.C. § 371

- (2) DoD: DoDD 5525.5, Enclosure 2.

- (3) Services.

- (a) AR 500-51, Chapter 2, Section 1.

- (b) SECNAVINST 5820.7B, para. 7.

- (c) AFI 10-801, Chapter 4.

- b. Any information collected in normal course of military operations may be provided to appropriate civilian law enforcement agencies.

- c. Collection must be compatible with military training and planning. To the maximum extent practicable, the needs of civilian law enforcement officials shall be taken into account in planning and execution of military training and operations. 10 U.S.C. § 371(b).

IX. COUNTERDRUG SUPPORT

A. References.

- 1. Law.

- a. 10 U.S.C. § 124.

- b. 32 U.S.C. § 112.

c. Section 1004, FY91 NDAA

d. Section 1031, FY97 NDAA

e. Section 1033, FY98 NDAA

2. DoD.

a. DEP&S Policy of 26 Jan 95.

b. CJCSI 3710.01.

c. NGB 500-2/ANGI 10-801.

B. General.

1. Counterdrug support operations have become an important activity within DoD. All DoD support is coordinated through the Office of the Defense Coordinator for Drug Enforcement Policy and Support (DEP&S), which is located within the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD (SO/LIC)).

2. What separates counterdrug support from most other areas of support is that it is non-reimbursable. For FY99, Congress appropriated nearly \$725 million for DoD counterdrug support. DEP&S channels that money to the providers of counterdrug support.

C. Detection and Monitoring.

1. 10 U.S.C. § 124 made DoD the lead federal agency for detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the United States. D&M is therefore a DoD mission.

a. Although a mission, D&M is to be carried out in support of federal, state, and local law enforcement authorities.

- b. Note that the statute does not extend to D&M missions covering land transit (i.e., the Mexican border).
 - c. Interception of vessels or aircraft is permissible outside the land area of the United States to identify and direct the vessel or aircraft to a location designated by the supported civilian authorities.
 - 2. D&M missions involve airborne (AWACs, aerostats), seaborne (primarily USN vessels), and land-based radar (to include Remote Other The Horizon Radar (ROTHR)) sites.
- D. National Guard.
 - 1. 32 U.S.C. § 112 provides federal funding for National Guard counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses.
 - 2. The State must prepare a drug interdiction and counter-drug activities plan. DEP&S reviews each State's implementation plan and disburses funds.
- E. Additional Support to Counterdrug Agencies.
 - 1. General. Congress has given DoD additional authorities to support federal, state, local, and foreign agencies that have counterdrug responsibilities. These are in addition to the authorities contained in 10 U.S.C. §§ 371-377 (discussed above). Congress has not chosen to codify these, however, so it is necessary to refer to the public laws instead. Many of these are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.
 - 2. Section 1004.
 - a. Section 1004 is the primary authority used for counterdrug operations. The statute permits broad support to the following law enforcement agencies which have counterdrug responsibilities:
 - (1) Federal, State, and Local.

- (2) Foreign, when requested by a federal counterdrug agency. (Typically the DEA or member of the State Department Country Team that has counterdrug responsibilities within the country.)

b. Types of support:

- (1) Maintenance and repair of equipment.
- (2) Transportation of personnel (U.S. & foreign), equipment, and supplies CONUS/OCONUS.
- (3) Establishment of bases of operations CONUS/OCONUS.
- (4) Training of law enforcement personnel, to include associated support and training expenses.
- (5) Detection and monitoring of air, sea, surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States.
- (6) Construction of roads, fences, and lighting along U.S. border.
- (7) Linguist and intelligence analyst services.
- (8) Aerial and ground reconnaissance.
- (9) Establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

c. These authorities are not exceptions to the Posse Comitatus Act. Any support provided must comply with the restrictions of the PCA. Additional, any domestic training provided must comply with the Deputy Secretary of Defense policy on advanced training.

d. Approval Authorities: CJCSI 3710.01.

- (1) Non-Operational Support.
 - (a) That which does not involve the active participation of DoD personnel, to include the provision of equipment only, use of facilities, and formal schoolhouse training, is requested and approved in accordance with DoDD 5525.5 and implementing Service regulations, discussed above.

- (2) Operational Support.
 - (a) The Secretary of Defense is the approval authority. The approval will typically be reflected in a CJCS-issued deployment order.

 - (b) SECDEF has delegated approval authority for certain missions to Combatant Commanders, with the ability for further delegation, but no lower than a flag officer. The delegation from SECDEF depends on the type of support provided, the number of personnel provided, and the length of the mission. See CJCSI 3710.01. Example: For certain missions along the southwest border, the delegations run from SECDEF to ACOM to FORSCOM to Joint Task Force SIX (JTF-6).

e. Requests for DoD support must meet the following criteria:

- (1) Support requested has clear counterdrug connection,
- (2) Support request must originate with federal, state or local agency having counterdrug responsibilities,
- (3) Request must be for support DoD authorized to provide,
- (4) Support must clearly assist with counterdrug activities of agency,

(5) Support is consistent with DoD support of the National Drug Control Strategy,

(a) DEP&S Priorities for the provision of support:

(i) Multi-jurisdictional, multi-agency task forces that are in a high intensity drug trafficking area (HIDTA)

(ii) Individual agencies in a HIDTA

(iii) Multi-jurisdictional, multi-agency task forces not in a HIDTA.

(iv) Individual agencies not in a HIDTA

(6) All approved CD operational support must have military training value.

3. Other Statutes.

a. Section 1206, FY 90 NDAA. Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas.

b. Section 1031, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Mexico. The support involves the transfer of certain non-lethal specialized equipment such as communication, radar, navigation, and photo equipment.

c. Section 1033, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Colombia and Peru. The additional support is similar that provided to Mexico under Section 1031, but also includes boats suitable for riverine operations.

X. MISCELLANEOUS SUPPORT

- A. Sensitive support: DoDDS-5210.36

- B. Law Enforcement Detachments
 - 1. Law: 10 U.S.C. § 379.

 - 2. U.S. Coast Guard personnel shall be assigned to naval vessels operating in drug interdiction areas. Such personnel have law enforcement powers, and are known as Law Enforcement Detachments (LEDET's).

 - 3. When approaching a contact of interest, tactical control (TACON) of the vessel shifts to the Coast Guard. As a "constructive" Coast Guard vessel, the ship and its crew are permitted to participate in direct law enforcement. However, to the maximum extent possible, the law enforcement duties should be left to the Coast Guard personnel. Military members should offer necessary support.

- C. Emergencies Involving Chemical or Biological Weapons
 - 1. Law: 10 U.S.C. § 382.

 - 2. In response to an emergency involving biological or chemical weapons of mass destruction that is beyond the capabilities of the civil authorities to handle, the Attorney General may request DoD assistance directly.

 - 3. The assistance provided includes monitoring, containing, disabling, and disposing of the weapon.

 - 4. Regulations, required by the statute, implementing the authority, have not yet been promulgated.

- D. Miscellaneous Exceptions. DoDD 5525.5, Encl. 4, para. A.2.e., contains a list of statutes which contain express authorization for the use of military forces to enforce the civil law. Among them are:

1. Protection of the President, Vice President, and other dignitaries.
2. Assistance in the case of crimes against members of Congress, foreign officials, or involving nuclear materials

XI. COLLECTION OF INTELLIGENCE CONCERNING U.S. PERSONS

A. Background

1. After World War II, the National Security Act of 1947 fundamentally reoriented the U.S. intelligence effort to one that functions during times of peace. The creation of the Central Intelligence Agency (CIA) is but one indication of the new orientation.
2. Unfortunately some of the fears of critics of standing intelligence organizations came true, mostly in the aftermath of the Vietnam War. A succession of investigations of the CIA by the President (Rockefeller Commission) and Congress (Church and Pike Commissions) detailed abuses. In response, and in an effort to preclude restrictive legislation, a series of Executive Orders were issued: E.O. 11905 by President Ford, E.O. 12306 by President Carter, and E.O. 12333 by President Reagan.
3. E.O. 12333 remains the authoritative source in this area. The order assigns intelligence responsibilities among various government agencies and, most important to this subject, provides guidance on the collection of intelligence on U.S. persons. In addition, the order contained certain specific prohibitions which are applicable in other contexts.
 - a. Specific prohibitions.
 - (1) Assassination. E.O. 12333, para. 2.11.
 - (2) Special activities (covert actions), unless specifically approved by the President and Congress is notified pursuant to 50 U.S.C. § 413.
 - (a) Normally only the CIA is authorized to conduct special activities. *See* E.O. 12333, para. 1.8(e).

- (b) DoD intelligence components are prohibited from conducting or providing support to Special Activities except in time of war.
 - (c) Special activities (covert actions) defined: activities of the U.S. government to influence political, economic, or military conditions abroad, where it is intended that the role of the U.S. will not be apparent or publicly acknowledged. Does not include “traditional” intelligence, counterintelligence, diplomatic, military, law enforcement, operational security, and administrative activities.
 - (3) DoD intelligence components requesting any person to undertake any activity prohibited by E.O. 12333 or its implementing directives. DoD 5240.1-R, Proc. 1, § A.4.
4. Each agency within the intelligence community was directed to prepare implementing instructions. DoD accomplished this with DoDD 5240.1. That directive authorized the publication of DoD 5240.1-R, which contains detailed guidance. Each Service has, in turn, promulgated its own implementing regulation or instruction. AR 381-10, for example, re-promulgates DoD 5240.1-R in full, inserting Army-specific guidance throughout in bold-faced type.
 5. DoD 5240.1-R is unusual in its format. Rather than being broken up into chapters, it is broken up into “Procedures.” For example, Procedure 5 is a chapter entitled “Electronic Surveillance.” Practitioners in this area, and this outline, will always refer to the applicable procedure.

B. General Rule.

1. DoD intelligence personnel may intentionally collect information that identifies a U.S. person *only* if the collection is necessary to conduct a function assigned to the collecting component, *only* if the collection falls within one of 13 authorized categories of collectable information, and *only* if the collection utilizes the least intrusive method consistent with accomplishing the mission.
2. The collection of information must:

- a. Not infringe on the constitutional rights of any **U.S. person**;
 - b. Be conducted to protect the privacy rights of all persons entitled to such protection;
 - c. Be based on a lawfully assigned function;
 - d. Use the least intrusive technique; **and**,
 - e. Comply with the appropriate agency/service regulatory requirements.
- 3. Procedures 2 through 4 provide the **sole** authority by which intelligence components may collect, retain and disseminate information concerning U.S. persons. DoD 5240.1-R, Proc. 1, § A.1.
 - 4. These procedures do not apply to intelligence components conducting law enforcement activities, including civil disturbances.

C. Collection of Intelligence on U.S. Persons (PROCEDURE 2).

- 1. Threshold Question #1: Is information being “Collected”?
 - a. Definition of Collection. Information is considered collected only when it:
 - (1) Has been received for use by DoD intelligence component;
 - (2) In the course of official duties; **and**
 - (3) There is an intent to use or retain the information. DoD 5240.1-R, Proc. 2, § B.1.
 - b. Unless it meets all three prongs above, it is not considered collected. Examples:

- (1) An FBI undercover officer provides information about a terrorist group. This information is not “collected” until the information is included in a report, entered into a database, or there is an intent to retain that information.
- c. Information held solely for the purpose of making a determination about its collectability, not otherwise disseminated, is not collected. Such information can be held up to 90 days pending this determination. DoD 5240.1-R, § B.1.

2. Threshold Question #2: Is the collection on a “U.S. Person”?

a. U.S. Person defined:

- (1) U.S. citizen;
- (2) Known permanent resident alien - a foreign national lawfully admitted into the U.S. for permanent residence;
- (3) Unincorporated association substantially composed of U.S. citizens or permanent resident aliens; or
- (4) Corporations if:
 - (a) Incorporated within U.S.
 - (b) Not directed and controlled by a foreign government.

b. Examples of non-U.S. persons for purposes of intelligence collection:

- (1) A non-immigrant foreign student attending college in the U.S.;
- (2) A corporation chartered in a foreign country, even if it’s a subsidiary of a U.S. corporation;

- (3) A U.S. corporation controlled by a foreign government
- c. Key Presumptions.
- (1) Any person/organization located outside the U.S. is presumed **NOT** to be a U.S. person unless there is specific information to the contrary. DoD Dir. 5240.1-R, Appendix A (Definitions), ¶ 25.
 - (2) An alien in the U.S. is presumed NOT to be a U.S. person unless there is specific information to the contrary. DoD 5240.1-R, Appendix A, ¶ 25.
3. Is the proposed collection within the unit's mission?
- a. Mission: a duty assigned to a military unit/command.
 - b. Does the unit have proper authority to collect the information? Authority is typically supplied by regulation or other formal documents.
4. Are the appropriate types of information being collected?
- a. Intelligence components are only authorized to collect information essential to the conduct of its mission and qualifies to be collected. DoD 5240.1-R, § C. Collectable Categories of Information include:
 - (1) Obtained with consent.
 - (2) Publicly available.
 - (3) Foreign Intelligence.
 - (a) Officers or employees, or acting on behalf of a foreign power.

- (b) Organization reasonably believed to be controlled, directly or indirectly, by a foreign power.
 - (c) Persons or organizations reasonably believed to be engaged or about to engage in international terrorist or narcotics activities.
 - (d) POW/MIAs; or targets, hostages, or victims of international terrorist organizations.
 - (e) Corporations or commercial organizations believed to have some connection with foreign powers, organizations, or persons. See below for limitation on collecting foreign intelligence information in the U.S..
- (4) Counterintelligence collection on U.S. persons must be limited to:
- (a) Persons are reasonably believed to be engaged in, or about to engage in intelligence activities on behalf of a foreign power or international terrorist activities.
 - (b) Persons in contact with the above groups (in order to identify and assess).
- (5) Potential Sources of Assistance. (Limited to the purposes of assessing their suitability or credibility)
- (6) Protection of Sources and Methods. Within the U.S., collection limited to:
- (a) Present and former DoD employees;
 - (b) Present and former DoD contractors; and

- (c) Applicants for employment with DoD or with a DoD contractor.
 - (7) Physical Security.
 - (8) Personnel Security Investigation.
 - (9) Communications Security Investigation.
 - (10) International Narcotics.
 - (11) International Terrorism.
 - (12) Overhead Reconnaissance not directed at a specific person.
 - (13) Administrative Purposes.
- b. All factual predicates must be supported by “reasonable belief.”
- c. What to do when there is doubt about the collectability of information?
- (1) Refuse to accept.
 - (2) Destroy the information.
 - (3) If the information pertains to another governmental function, send it to them.
 - (4) Seek a collectability determination.
5. How will the information be collected?
- a. Least Intrusive Means. Hierarchy of methods:

- (1) With consent or publicly available;
- (2) Cooperating sources;
- (3) Techniques not requiring a judicial warrant or Attorney General approval (no expectation of privacy); and
- (4) Techniques requiring a judicial warrant or Attorney General approval (expectation of privacy).

b. Collection of Foreign Intelligence From U.S. Persons Within U.S.

- (1) Use overt techniques where possible.
- (2) If it cannot reasonably be obtained through overt techniques:
 - (a) The information sought must be significant and not for the purpose of acquiring information concerning the domestic activities of any U.S. persons;
 - (b) FBI coordination is required; and
 - (c) The Director, DIA, or the Director, Defense HUMINT, must approve in writing the use of other than overt means. A copy of this approval must be forwarded to ASD(P) and reflect coordination with DIA General Counsel. *See* DoD 5240.1-R, Proc. 2, § E and ILH ¶ 3-14c.

D. Retention of Information (Procedure 3).

1. Applies only to information collected without the consent of the target.
2. Does not apply to retention required by law, court order, or solely administrative purposes. DoD 5240.1-R, Proc. 3, § A.

3. Retention means retention plus retrievability by the person's name or other identifying data (i.e., SSN). DoD 5240.1-R, Proc. 3, § B.
 4. Information may be retained if:
 - a. Collected under Procedure 2;
 - b. Acquired incidentally to authorized collection if the information:
 - (1) Could have been collected intentionally under Procedure 2;
 - (2) Is necessary to understand/access foreign intelligence or counterintelligence;
 - (3) Is foreign intelligence or counterintelligence collected from electronic surveillance IAW Procedure 5; or,
 - (4) Indicates involvement in activities that may violate federal, state, local, or foreign law.
 - c. Relates to functions of other U.S. agencies; or
 - d. Retention is only temporary (up to 90 days).
 5. Other information may be retained only in order to report it for oversight purposes and for subsequent proceedings.
 6. Information about U.S. persons must be reviewed periodically to determine whether the retained information still serves the purposes for which it was originally retained, and is still necessary to the conduct of authorized functions. *See* DoD 5240.1-R, Proc. 3, § D.
- E. Dissemination of Information. (Procedure 4)
1. Refers only to dissemination outside of DoD intelligence component that originally collected the information.

2. Applies only to information collected without the consent of the target.
3. Does not apply to retention required by law, court order, or solely for administrative purposes.
4. Information may be disseminated outside the component if:
 - a. Information collected under Procedures 2 or 3; **and**
 - b. Recipient has a need for the information in the performance of a lawful governmental function **and** the recipient is:
 - (1) DoD employee or contractor;
 - (2) Federal, state, or local law enforcement agency;
 - (3) Intelligence community agency;
 - (4) Non-law enforcement, non-intelligence agency of the federal government; or
 - (5) Foreign government.
5. Other dissemination requires approval of component legal office and consultation with Department of Justice and DoD General Counsel. DoD 5240.1-R, Proc. 4, § C.

F. What To Do When Things Go Wrong.

1. Questionable Activities (DoD 5240.1-R, Proc. 15).
 - a. Defined. Any conduct that constitutes, or is related to an intelligence activity that may violate the law (any Executive Order or Presidential directive, DoD policy, and Service regulations). Must be reported to HQDA within five calendar days after discovery.

b. Investigations.

(1) Conducted by command or IG.

2. Reporting Federal Crimes to the Department of Justice.

a. 28 U.S.C. § 535 requires expeditious report to Attorney General of violations of federal law by federal employees, unless authority is assigned elsewhere (e.g., UCMJ violations).