

CHAPTER 9.

INTELLIGENCE LAW AND POLICY CONSIDERATIONS DURING DOMESTIC SUPPORT OPERATIONS

KEY REFERENCES:

- 50 U.S.C. § 1801 et seq. - Foreign Intelligence Surveillance
- Executive Order 12333 - U.S. Intelligence Activities
- DODD 5240.1 - DOD Intelligence Activities
- DOD 5240.1-R - Procedures Governing the Activities of DOD Intelligence Components That Affect U.S. Persons

A. Introduction

Military intelligence units have a very limited role during domestic support operations other than civil disturbance operations. **U.S. Dep't of Defense, Reg. 5240.1-R, Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons** (Dec. 1982)[hereinafter DOD 5240.1-R], does not apply to DOD intelligence components when they perform authorized law enforcement activities, including civil disturbance activities. In such cases, DOD intelligence components may collect, report, process, and store information on the activities of persons and organizations not affiliated with the Department in accordance with **U.S. Dep't of Defense, Dir. 5200.27, Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense** (7 Jan. 1980) and **U.S. Dep't of Defense Civil Disturbance Plan (GARDEN PLOT)** (15 Feb. 1991). There are two reasons for this. First, the mission of military intelligence units is to collect foreign intelligence (FI) *Foreign intelligence* means information relating to the capabilities, intentions, and activities of foreign powers, organizations, or persons, but not including counterintelligence except for information on international terrorist activities. Exec. Order No. 12,333, U.S. Intelligence Activities, para. 3.4(d)(Dec. 4, 1981)[hereinafter EO 12333]. and counterintelligence (CI), *Counterintelligence* means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons, or international terrorist activities, but not including personnel, physical, document, or communications security programs. *Id.* at para. 3.4(a). neither of which is present in a typical domestic support operation. Second, military intelligence organizations are generally prohibited from collecting, retaining, or disseminating information about the domestic activities *Domestic activities* refers to activities that take place within the United States that do not involve a significant connection with a foreign power, organization, or person. DOD 5240.1-R, *supra* note 1, at paragraph B3. of United States (U.S.) persons. "*United States person*" means a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments. EO 12333, *supra* note 2, at para. 3.4(i). Commanders and their staffs should carefully consider these restrictions when planning domestic support operations. Depending on the mission, it may be inappropriate to assign intelligence tasks to subordinate units. To the extent that any intelligence tasks are assigned to subordinate units, commanders must ensure that those tasks are narrowly tailored to accomplish an authorized function of the unit concerned, and that the unit performs those tasks in accordance with applicable law and policy. This section examines the proper role of military intelligence units during domestic support operations; the rules regarding the collection, retention, and dissemination of information about U.S. persons; and the judge advocate's responsibilities in this area.

B. The Role Of Military Intelligence Units During Domestic

Support Operations

Department of Defense (DOD) intelligence activities are governed by three primary references. Executive Order (EO) 12333, *United States Intelligence Activities*, lays out the goals and direction of the national intelligence effort, and describes the roles and responsibilities of the different elements of the US intelligence community. *Id.* DOD Directive (DODD) 5240.1, **U.S. Dep't of Defense, Dir. 5240.1, DoD Intelligence Activities** (25 Apr. 1988) [hereinafter DODD 5240.1]. *DOD Intelligence Activities*, and DOD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that affect United States Persons* DOD 5240.1-R, *supra* note 1. implement the guidance contained in EO 12333 as it pertains to DOD.

These authorities authorize the FI and CI elements of the Army, Navy, Air Force, and Marine Corps to collect, produce, and disseminate military and military-related FI and CI, and information on the foreign aspects of narcotics production and trafficking. Implicit in this authorization is a requirement that such intelligence relate to the activities of foreign powers, organizations, persons, and their agents (including U.S. persons). Because domestic support operations rarely involve foreign powers, organizations, or persons, military intelligence organizations typically have little or no role to play during such operations.

In the absence of any foreign involvement, military intelligence organizations are generally limited to performing non-intelligence functions in a domestic support operation. Moreover, to the extent that military intelligence organizations are authorized to collect FI or CI within the United States, they may do so only in coordination with the Federal Bureau of Investigation (FBI), which has primary responsibility for intelligence collection within the United States. It is important to remember that the Lead Federal Agency (LFA) exercises overall responsibility for the collection, analysis, and dissemination of information concerning the operating environment.

Within the Department of Defense, the Defense Criminal Investigative Organizations (DCIOs) have primary responsibility for gathering and disseminating information about the domestic activities of U.S. persons that threaten DOD personnel or property. DOD components, other than the intelligence components, may collect, report, process, and store information on the activities of persons and organizations not affiliated with the Department of Defense only in the limited circumstances authorized by DOD 5200.27, *Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense*. Those circumstances include the acquisition of information essential to accomplish the following DOD missions: protection of DOD functions and property, personnel security, and operations related to civil disturbances.

Military intelligence organizations may, however, still collect, retain, produce and disseminate information such as maps, terrain analysis, and damage assessments so long as they do not identify an U.S. person. An U.S. person, however, includes many unincorporated associations and U.S. corporations (e.g., "Joe's Diner"). *See* note 5, *supra*, which contains the definition of an U.S. person.

C. Intelligence Collection Within The United States

In accordance with EO 12333, the Department of Defense has established procedures in DODD 5240.1 and DOD 5240.1-R for the collection, retention, and dissemination of information concerning U.S. persons. Judge advocates must read these authorities before advising a commander on the collection of information in a domestic support operation. DODD 5240.1 and DOD 5240.1-R apply to all DOD intelligence components and activities. DODD 5240.1, *supra* note 7, at para. 2.3 does not apply to authorized law enforcement activities carried out by DoD intelligence components having a law enforcement mission. Special emphasis is given to the protection of the constitutional rights and privacy of U.S. citizens. Collection techniques must use the least intrusive means feasible. *Id.* at para. 4.1. Collection of information on U.S. persons must be necessary to the functions of the DOD intelligence component concerned. *Id.* at 4.2.1. DODD 5240.1 states that it "... shall be the only authority used as guidance by DOD intelligence components to collect, retain, or disseminate information concerning U.S. persons." Further, it requires all DOD employees to report violations of intelligence law to the Inspector General or General Counsel of the DOD intelligence component concerned.

The specific procedures governing the collection of information on U.S. persons by DOD intelligence components

DoD intelligence components include: (a) The National Security Agency/Central Security Service, (b) The Defense Intelligence Agency, (c) offices within DoD for the collection of specialized national foreign intelligence through reconnaissance programs, (d) The Assistant Chief of Staff for Intelligence, Army General Staff, (e) The Office of Naval Intelligence, (f) The Assistant Chief of Staff, Intelligence, U.S. Air Force, (g) The Army intelligence and Security Command, (h) The Naval Intelligence Command, (i) The Naval Security Group Command, (j) The Director of Intelligence, U.S. Marine Corps, (k) The Air Force Intelligence Service, (l) The Electronic Security Command, U.S. Air Force, (m) The counterintelligence elements of the Naval Investigative Service, (n) The counterintelligence elements of the Air Force Office of Special Investigations, (o) The 650th Military Intelligence Group, SHAPE, (p) Other organizations, staffs, and offices, when used for foreign intelligence or counterintelligence activities to which part 2 of EO 12333 applies, provided that the heads of such organizations, staffs, and offices shall not be considered as heads of DoD intelligence components for purposes of this Regulation. DOD 5240.1-R, *supra* note 1, at appendix A, para. 8. are provided in DOD 5240.1-R. DOD 5240.1-R is divided into fifteen separate procedures that govern the collection of intelligence. The purpose of these procedures is to enable DOD intelligence components to effectively carry out their authorized functions while ensuring their activities that affect U.S. persons are carried out in a manner that protects the constitutional rights and privacy of such persons. *Id.* at para. B. Procedures 2 through 4 provide the sole authority by which DOD components may collect, retain, and disseminate information concerning U.S. persons. Procedures 5-10 set forth the applicable guidance with respect to the use of certain collection techniques to obtain information for foreign intelligence and counterintelligence purposes. Procedures 11 through 15 govern other aspects of DOD intelligence activities, including the oversight of such activities. In addition to the procedures themselves, the Defense Human Intelligence Service, Defense Intelligence Agency, has published an instructive manual entitled *The Intelligence Law Handbook* (September 1995), to provide additional interpretive guidance to assist legal advisers, intelligence oversight officials, and operators in applying DOD 5240.1-R. See also *Appendix 9-1, Policy Guidance for Intel Support in CONUS*.

D. Judge Advocate Intelligence Law And Oversight Responsibilities

Judge advocates (JAs) are responsible for the following: advising the commander and staff on all intelligence law and oversight matters within their purview; recommending legally acceptable courses of action; establishing, in coordination with the Assistant Chief of Staff for Intelligence (G-2/S-2) and the Inspector General (IG), an intelligence oversight program that helps ensure compliance with applicable law and policy; reviewing all intelligence plans, proposals, and concepts for legality and propriety; and training members of the command who are engaged in intelligence activities on all laws, policies, treaties, and agreements that apply to their activities. JAs must be familiar with the missions, plans, and capabilities of subordinate intelligence units, and all laws and policies (many of which are classified) that apply to their activities. At a minimum, JAs should be familiar with the restrictions on the collection, retention, and dissemination of information about U.S. persons, the approval authorities for the various intelligence activities performed by subordinate units, and the requirement to report and investigate questionable activities and certain federal crimes. DOD 5240.1-R, *supra* note 1, at procedure 15. JAs also should establish close working relationships with the legal advisors of supporting intelligence agencies and organizations, all of whom can provide expert assistance.