

## CHAPTER 12

### DOMESTIC OPERATIONS

#### REFERENCES

1. Posse Comitatus Act, 18 U.S.C. § 1385
2. Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. §§ 371-382
3. Insurrection Statutes, 10 U.S.C. §§ 331-334
4. Stafford Act, 42 U.S.C. § 5121, *et seq.*, as amended
5. Defense Against Weapons of Mass Destruction Act of 1996, Pub. L. No. 104-201
6. Drug Interdiction and Counter-Drug Activities, 32 U.S.C. § 112
7. Response to Threats of Terrorist Use of Weapons of Mass Destruction, 50 U.S.C. § 2311
8. Operations Relating to Defense Against Weapons of Mass Destruction and Terrorist Attacks, 10 U.S.C. § 12310(c)
9. Homeland Security Act of 2002, Pub. L. No. 107-296 (2002).
10. National Response Framework, January 2008
11. Homeland Security Presidential Directive (HSPD)-5 (28 Feb. 2003)
12. U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (29 Dec. 2010, Incorporating Change 1, 21 Sep. 2012)
13. U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013)
14. U.S. DEP'T OF DEFENSE, INSTR. 3025.22, THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES (26 July 2013)
15. U.S. DEP'T OF DEFENSE, DIR. 5210.56, CARRYING OF FIREARMS AND THE USE OF FORCE BY DoD PERSONNEL ENGAGED IN SECURITY, LAW AND ORDER, OR COUNTERINTELLIGENCE ACTIVITIES (1 APR. 2011)
16. U.S. DEP'T OF DEFENSE, DIR. 5200.31E, DoD MILITARY WORKING DOG (MWD) PROGRAM (10 AUG. 2011)
17. U.S. DEP'T OF DEFENSE, INSTR. 6055.06, DoD FIRE AND EMERGENCY SERVICES (F&ES) PROGRAM (21 Dec. 2006)
18. JOINT CHIEFS OF STAFF, INSTR. 3710.01B, DoD COUNTERDRUG SUPPORT (26 Jan. 2007)
19. U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES (12 Mar. 1993)
20. U.S. DEP'T OF ARMY, REG. 700-131, LOAN, LEASE, AND DONATION OF ARMY MATERIEL (23 Aug. 2004)
21. U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (Oct. 2008)
22. U.S. NATIONAL GUARD BUREAU, REG. 500-1/ANGI 10-8101, NATIONAL GUARD DOMESTIC OPERATIONS (13 Jun. 2008)
23. U.S. NATIONAL GUARD BUREAU, REG. 500-2/ANGI 10-801, NATIONAL GUARD COUNTERDRUG SUPPORT (29 Aug. 2008)
24. U.S. DEP'T OF NAVY, SECNAV INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (26 Jan. 2006)
25. U.S. DEP'T OF NAVY, OPNAV INSTR. 3440.16D, NAVY DEFENSE SUPPORT OF CIVIL AUTHORITIES PROGRAM (29 Jun. 2009)
26. U.S. DEP'T OF AIR FORCE, INSTR. 10-801, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (19 SEP. 2012)

#### I. OVERVIEW

The military's primary mission has been fighting and winning the nation's wars. After the tragic events of September 11, 2001, military involvement in domestic operations has expanded. Today's military leaders still need to be ready to protect the United States from direct attack from both state and non-state actors. But they also need to be prepared to provide support to civil authorities in a variety of areas, from disaster relief, to suppressing insurrections, to responding to chemical, biological, radiological, nuclear and explosive events. This chapter will

outline the increasingly complex legal framework for the use of the military within the United States for both homeland defense and support to civil authorities.

## II. DEFINITIONS: HOMELAND DEFENSE AND CIVIL SUPPORT

Today's Military must be prepared for both homeland defense and civil support missions. "Defending U.S. territory and the people of the United States is the highest priority of the Department of Defense (DoD), and providing appropriate defense support of civil authorities (DSCA) is one of the Department's primary missions." DEPARTMENT OF DEFENSE, STRATEGY FOR HOMELAND DEFENSE AND DEFENSE SUPPORT OF CIVIL AUTHORITIES 1 (Feb. 2013), available at <http://www.defense.gov/news/Homelanddefensestrategy.pdf>.

A. The DoD has defined Homeland Defense (HD) as the "protection of U.S. sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats as directed by the President." It is generally considered to consist of war-fighting missions led by the DoD. Examples include combat air patrols and maritime defense operations.

B. The DoD has defined Civil Support (CS) as support to civil authorities for domestic emergencies and other designated activities. Examples include disaster response, counterdrug (CD) support, and support to civilian law enforcement agencies.

## III. CIVIL SUPPORT (AKA DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA))

A. The Deputy Secretary of Defense (DEPSECDEF) directed the Assistant Secretary of Homeland Defense and Americas' Security Affairs (ASD (HD&ASA)) to "update and streamline" DoDDs 3025.15, 3025.1 and 3025.12, and "other related issuances." As a result, DoDD 3025.18, Defense Support of Civil Authorities (DSCA), was released on 29 December 2010, incorporating and canceling DoDDs 3025.15 and 3025.1. In addition, on February 27, 2013, DoD issued DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, which incorporates and cancels DoDDs 3025.12, 5525.5, and 5030.46.

B. It is DoD's policy that DoD shall cooperate with and provide defense support of civil authorities as directed by and consistent with applicable law, Presidential Directives, Executive Orders, and DoDD 3025.18. Assistance is generally one of support; the civilian authorities retain primary responsibility.

C. DoDD 3025.18.

1. DoDD 3025.18 provides guidance for the execution and oversight of DSCA when requested by civil authorities or by qualifying entities and approved by the appropriate DoD official, or as directed by the President, within the United States, including the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States or any political subdivision thereof. The directive 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 these criteria in providing a recommendation up the chain of command.

- a. *Legality*: compliance with the law.
- b. *Lethality*: potential use of lethal force by or against DoD forces.
- c. *Risk*: safety of DoD forces.
- d. *Cost*: who pays, impact on DoD budget.
- e. *Appropriateness*: whether the requested mission is in the interest of DoD to conduct.
- f. *Readiness*: impact on DoD's ability to perform its primary mission.

2. *Approval Authority*. DoDD 3025.18 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. For this reason, DoDD 3025.18 should always be the first directive consulted.

3. The directive states, "[u]nless approval authority is otherwise delegated by the Secretary of Defense, all DSCA requests shall be submitted to the office of the Executive Secretary of the Department of Defense."

4. SECDEF is the approval authority for:

- a. Civil disturbances (DoDD 3025.18, para. 4.j.(1)).
  - b. Responses to Chemical, Biological, Radiological, Nuclear, and High-Yield Explosives (CBRNE) events (DoDD 3025.18, para. 4.j.(2)).
  - c. Defense assistance to civilian law enforcement organizations except as authorized by DoDI 3025.21 (DoDD 3025.18, para. 4.j.(3)).
  - d. Assistance in responding with assets with potential for lethality (DoDD 3025.18, para. 4.j.(4)).
  - e. Use of DoD unmanned aerial systems (DoDD 3025.18, para. 4.o).
5. Support for Civil Disasters. Follow DoDD 3025.18.
6. When Combatant Command-assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff (CJCS). CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected Combatant Command (DoDD 3025.18, para. 4.5).

#### IV. RESTRICTIONS ON CIVIL SUPPORT: THE POSSE COMITATUS ACT (PCA)

A. Although the Armed Forces must be ready to provide assistance to civil authorities, there are significant restrictions on the use of the military for law enforcement activities within the United States. The Posse Comitatus Act is one of the limitations. The PCA criminalizes the use of the military for certain law enforcement activities. To advise commanders properly, especially in the area of CS, Judge Advocates (JAs) must understand the limitations created by the PCA, and the constitutional and statutory exceptions to the PCA. The PCA states:

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.

##### B. Definition and History.

1. *Posse comitatus*: ‘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. Prior to 1878, the U.S. military was used extensively as a posse comitatus to enforce various laws as diverse as the Fugitive Slave Act and Reconstruction-era laws. Over time, the authority level necessary for local law enforcement to call on the military as a posse comitatus devolved down to the lowest level. For several reasons (e.g., the Army’s increasingly vocal objection to “commandeering of its troops” and Southerners’ complaints that the Northern-based Federal military was unfairly enforcing laws against them), Congress sought to terminate the prevalent use of Federal Soldiers in civilian law enforcement roles. Accordingly, Congress passed the PCA in 1878 as a rider to an Army Appropriations Act, limiting the circumstances under which the Army could be used as a posse comitatus to “execute the laws.”

##### C. To Whom the Posse Comitatus Act (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); *United States v. Acosta-Cartegena*, 128 F. Supp. 2d 69 (D.P.R. 2000)).

b. In 10 U.S.C. § 375, Congress directed the Secretary of Defense (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.*” These regulations appear in DoDI 3025.21. Therefore, the proscription against direct participation in civilian law enforcement activities by active duty military members has been extended by regulation to the Navy and Marine Corps. However, SECDEF and the Secretary of the Navy (SECNAV) may still grant exceptions to this proscription on a case-by-case basis (DoDI 3025.21).

2. Army Reserve, Air Force Reserve, Navy Reserve and Marine Corps Reserve when they are in a drilling status (on active duty, active duty for training, or inactive duty for training).
3. National Guard personnel only when they are in Federal service (i.e., a Title 10 status).
4. Civilian employees of DoD when under the direct command and control of a military officer (DoDI 3025.21).

D. To 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 not rendered under the direction or control of DoD authorities (DoDI 3025.21).

2. A member of the National Guard when not in Federal service (i.e., while serving under state control in Title 32 or State Active Duty status).

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 (14 U.S.C. § 2) (*Jackson v. Alaska*, 572 P.2d 87 (Alaska 1977)).

5. Members of the armed forces who are not a “part of the Army or Air Force.” In a 1970 Department of Justice opinion, then-Assistant Attorney General William Rehnquist addressed the assignment of Army personnel to the Department of Transportation (DoT) to act as U.S. Marshals. He determined that this was not a violation of the PCA since: (a) a statute (49 U.S.C. § 1657) expressly authorized the detailing of military members to DoT; (b) under the statute, the assigned members were not charged against statutory limits on grade or end strength; and (c) the members were not subject to direct or indirect command of their military department of any officer thereof. He determined, therefore, that they were DoT employees for the duration of the detail. Therefore, they were not “part of the Army or Air Force” (Memorandum for Benjamin Forman, Assistant General Counsel, Department of Defense, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Legality of deputizing military personnel assigned to the Department of Transportation* (Sept. 30, 1970) (“Transportation Opinion”).

E. To What Actions the PCA Applies.

1. When determining what actions are covered by the PCA (i.e., what constitutes “execut[ing] the law” under the statute), one must consider both directives and case law, as they are not identical. In fact, case law prohibits a much broader range of activities as “execut[ing] the law.” Some of these issues have been addressed in various Service Judge Advocate General opinions, but other instances will require one to apply the court tests described below.

a. Directive/Regulation (DoDI 3025.21).

(1) Prohibits direct law enforcement assistance, including:

(a) Interdiction of a vehicle, vessel, aircraft, or other similar activity.

(b) Search or seizure.

(c) Arrest, apprehension, stop and frisk, or similar activity.

(d) Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators (DoDI 3025.21).

b. Case Law.

(1) *Analytical framework*. There are three separate tests that courts apply to determine whether the use of military personnel has violated the PCA (*United States v. Kahn*, 35 F.3d 426 (9th Cir. 1994); *United States v. Hitchcock*, 103 F.Supp. 2d 1226 (D. Haw. 1999)).

(a) FIRST TEST: whether the action of the military personnel was “active” or “passive” (*United States v. Red Feather*, 392 F. Supp. 916, 921 (W.D.S.D 1975); *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988); *United States v. Rasheed*, 802 F. Supp. 312 (D. Haw. 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. denied* 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 that was: *Regulatory* (a power that controls or directs); *Proscriptive* (a power that prohibits or condemns); or *Compulsory* (a power 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, 895-6 (D.D.C. 1988); *United States v. Kahn*, 35 F.3d 426 (9th Cir. 1994)).

2. *Military Purpose Activities* (DoDI 3025.21). 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.” To qualify as such an action, its primary purpose must be to further a military interest, and civilians may receive an incidental benefit. Such military purposes include:

a. 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) (DoDI 3025.21)).

b. 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 (DoDI 3025.21).

c. 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)).

d. Protection of classified military information or equipment (DoDI 3025.21).

e. Protection of DoD personnel, DoD equipment, and official guests of the DoD (*United States v. Chon*, 210 F.3d 990 (9th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000) (NCIS investigation of civilians undertaken for independent purpose of recovering military equipment was permissible) (DoDI 3025.21).

f. Other actions undertaken primarily for a military or foreign affairs purpose (DoDI 3025.21).

#### F. Where the PCA Applies – Extraterritorial Effect of the PCA.

1. A 1989 Department of Justice Office of Legal Counsel opinion concluded that the PCA does not have extraterritorial application (Memorandum, Office Legal Counsel for General Brent Scowcroft, 3 Nov. 1989). This opinion also states that the restrictions of 10 U.S.C. §§ 371-381 (specifically, 10 U.S.C. § 375), were also not intended to have extraterritorial effect.

2. Some courts have also adopted the view that the PCA 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); *United States v. Marcos*, No. SSSS 87 Cr. 598, 1990 U.S. Dist. LEXIS 2049 (S.D.N.Y. Feb. 28, 1990)). (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 the 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 reflected in DoDI 3025.21 (which incorporates the restrictions of 10 U.S.C. § 375), applies to all U.S. forces wherever they may be located. Two weeks after the promulgation of the Department of Justice (DoJ) memo, then-Secretary of Defense 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 United States (DoDI 3025.21).

## G. The Effects of Violating the PCA.

### 1. *Criminal Sanctions*. Two years imprisonment, fine, or both.

a. To date, no direct criminal action has been brought for violations of the PCA. The issue of the PCA has arisen instead as a “collateral” issue, whether as a defense to a charge by a criminal defendant (*see Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); *United States v. Red Feather*, 392 F. Supp. 916 (W.D.S.D. 1975)), or in support of an argument for exclusion of evidence.

b. *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, thus there is little need to use the deterrent of the exclusionary rule. Also, because 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. Courts 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); *United States v. Thompson*, 30 M.J. 570 (A.F.C.M.R. 1990)).

(4) Failure to prove an element. 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)).

(5) Dismissal of charges. Not likely to be considered an appropriate remedy (*United States v. Rasheed*, 802 F. Supp 312 (D. Haw. 1992); *United States v. Hitchcock*, 103 F. Supp 2d. 1226 (D. Haw. 1999)).

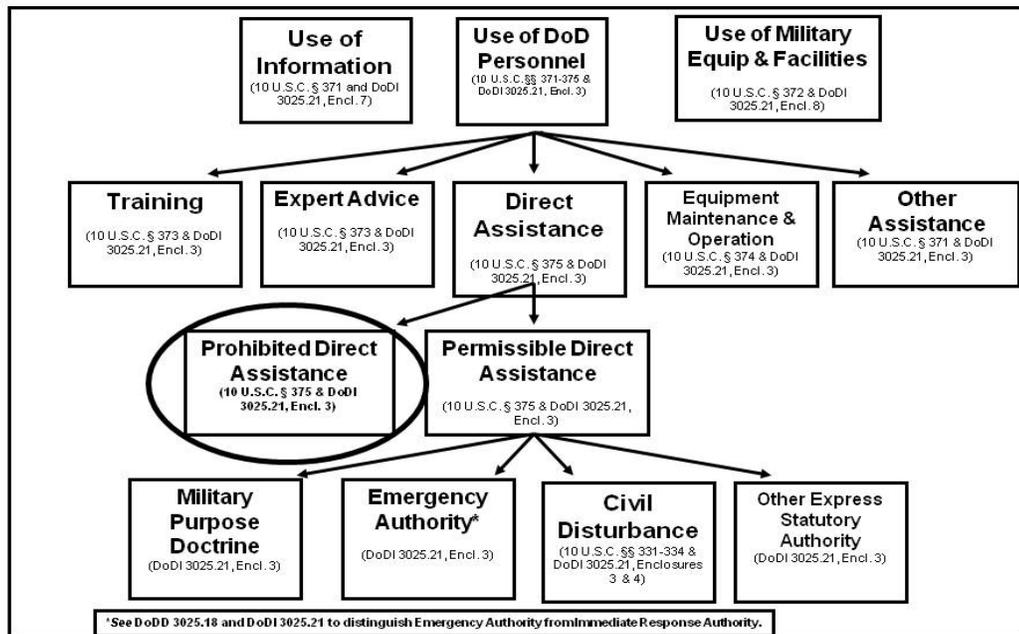
### 2. *Civil Liability*.

a. PCA violation as a private cause of action? No. The PCA is a criminal statute and does not provide 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—a “Bivens suit” (*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), where the U.S. Supreme Court announced that Federal officials can be sued personally for money damages for the alleged violation of constitutional rights stemming from official acts)? This is an evolving area (*Applewhite v. United States Air Force*, 995 F.2d. 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994) (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), *aff'd*, 485 U.S. 264 (1988) (finding a private right of action under the 4th Amendment)).

c. Federal Tort Claims Act (FTCA) (28 U.S.C. §§ 1346(b), 2671-2680)? Possibly. With exceptions, the FTCA allows suits against the United States for injuries caused by the negligent or wrongful acts or omissions of any Federal employee acting within the scope of his employment, in accordance with the law of the state where the act or omission occurred. Consequently, an FTCA claim against a Soldier allegedly violating the PCA would be a civil action (likely in Federal District Court after substitution and removal from a state court, if necessary) and the court would apply the state law in the analogous tort action, and Federal law.

## PCA RESTRICTIONS UNDER 10 U.S.C. §§ 371-375 AND DoDI 3025.21



### V. SUPPORT TO CIVILIAN LAW ENFORCEMENT (EXCEPTIONS TO THE PCA)

A. When providing support to civilian law enforcement, there is always a concern that such actions may run afoul of the PCA. The chart above illustrates permissible and non-permissible activities (non-permissible activities are circled).

B. Although the activities discussed below can be considered law enforcement-type activities, they do not violate the PCA since the military personnel do not provide direct assistance. In addition, many of them are statutorily directed, and therefore could be considered “exceptions” to the PCA. This section is broken down into three functional areas of support: (1) loan of equipment and facilities; (2) expert advice and training; and (3) sharing information. Material otherwise not covered in one of these three areas can be found in DoDI 3025.21.

#### 1. *Loan of Equipment and Facilities.*

##### a. Key References.

- (1) Law. 10 U.S.C. §§ 372 and 374.
- (2) Directives. DoDD 3025.18 and DoDI 3025.21.

b. 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.

c. There must be no adverse impact on national security or military preparedness.

##### d. *Approval authority.*

(1) SECDEF is the approval authority for requests for assistance with the potential for confrontation between DoD personnel and civilian individual groups, as well as any requests for potentially lethal support, including loans of:

- (a) Arms.
- (b) Combat and tactical vehicles, vessels, or aircraft.

(c) Ammunition. (DoDD 3025.18, para. 4.j.(4)).

(2) Requests for loans of equipment, facilities, or personnel made by law enforcement agencies, including the Coast Guard when not acting as part of the Navy, shall be made and approved in accordance with DoDI 3025.21, but at a level no lower than a flag or general officer, or equivalent civilian, with the exceptions discussed in the following authorities:

- (a) AR 700-131.
- (b) SECNAVINST 5820.7C.
- (c) AFI 10-801.

2. *Expert Advice and Training.*

a. Key References.

- (1) Law. 10 U.S.C. §§ 373, 375, 377; and 50 U.S.C. §§ 2312, 2315.
- (2) Directives. DoDI 3025.21 and DoDD 5200.31E.

b. Military personnel may be used to **train** civilian law enforcement personnel in the use of equipment that the DoD provides. 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.

(1) Note that the DEPSECDEF has provided policy guidance in this area, via memorandum, which limits the types of training U.S. forces may provide. The policy is based on prudent concerns that advanced training could be misapplied or misused by civilian law enforcement agencies, resulting in death or injury to non-hostile persons. The memorandum 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 (TTP) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists.” Examples of such training include: sniper training; military operations in urban terrain (MOU); advanced MOU; and close quarter battle/close quarter combat (CQB/CQC) training. (Appendix A.)

(2) A single general exception exists to provide this advanced training at the U.S. Army Military Police School. In addition, the Commander, United States Special Operations Command (USSOCOM), may approve this training, on an exceptional basis, by special operations forces personnel. (Appendix A.)

c. 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 specific example of this type of support (advice) is the military working dog team’s (MWDT) support to civilian law enforcement. The military working dog (MWD) has been analogized to equipment, and its handler provides expert advice. (See DoDD 5200.31E, Military Working Dog (MWD) Program, 10 Aug. 2011).

(a) Pursuant to 10 U.S.C. § 372, the Secretary of Defense may make available equipment to any Federal, state, or local law enforcement agencies (LEA) for law enforcement purposes. So, upon request, an MWD (viewed by the DoD as a piece of equipment) may be loaned to law enforcement officials. Moreover, MWD handlers may be made available to assist and advise law enforcement personnel in the use of the MWD under 10 U.S.C. § 373. If a MWD is loaned to an LEA, its military handlers will be provided to work with the particular MWD. An MWD is always loaned with its handler since they work as a team.

(b) In all cases, MWDT support may be provided only under circumstances that preclude any confrontation between MWDTs and civilian subjects of search. In addition, MWDTs shall not be used to pursue, track, attack, or hold for apprehension purposes and MWD handlers shall not engage in the execution of a warrant, search, seizure, arrest, or any other activity when such actions would violate the PCA.

d. *Weapons of Mass Destruction (WMD).* Congress has directed DoD to provide certain expert advice to Federal, state and local agencies with regard to 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. The Department of Energy runs the program for responses to nuclear emergencies.

3. *Sharing Information.*

a. Key References.

(1) Law. 10 U.S.C. § 371.

(2) Instruction. DoDI 3025.21.

b. Military Departments and Defense Agencies are encouraged to provide to federal, state, or local civilian law enforcement officials any information collected during the **normal course of military operations** that may be relevant to a violation of any Federal or state law within the jurisdiction of such officials. (DoDD 3025.21).

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 the planning and execution of military training and operations. (10 U.S.C. § 371(b)).

d. However, the planning and/or creation of missions or training for the primary purpose of aiding civilian law enforcement officials are prohibited. (DoDI 3025.21).

## VI. CIVIL DISTURBANCES

A. Key References.

1. Law.

a. 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.”

b. The Insurrection Act (10 U.S.C. §§ 331–335).

2. Instruction. DoDI 3025.21.

B. The primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the state and local government (DoDI 3025.21). 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 civilian 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 in the following circumstances, subject to certain limitations:

1. An insurrection within a state. The legislature or governor must request assistance from the President (10 U.S.C. § 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 (10 U.S.C. § 332).

3. To suppress in any state, any insurrection, domestic violence, unlawful combination or conspiracy, if it:

a. Hinders execution of state and U.S. law protecting Constitutional rights and the state is unable, fails, or refuses to protect those rights (the state is considered to have denied equal protection under the Constitution), or;

b. Opposes or obstructs execution of U.S. law or justice (10 U.S.C. § 333).

4. If the President considers it necessary to use the armed forces, he must first issue a proclamation directing the insurgents to disperse and retire peacefully (10 U.S.C. § 334).

D. The Overall Federal Response.

1. Responsibility for the management of the Federal response to civil disturbances rests with the Attorney General of the United States.

2. As discussed above, if the President decides to respond to the situation, he must first issue a proclamation to the persons responsible for the insurrection, prepared by the Attorney General, directing them to disperse within a limited time. 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 3025.18, para. 4.j.(1)).

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 (DoDI 3025.21).

F. **Emergency Employment of Military Forces** (DoDI 3025.21).

1. Military forces shall not be used for civil disturbances unless specifically directed by the President, pursuant to 10 U.S.C. §§ 331-334. There is a very limited exception to this rule, when:

a. In extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale unexpected civil disturbances. Federal military action is permitted only when:

b. Such activities are necessary to prevent significant loss of life or wanton destruction of property, and are necessary to restore governmental functioning and public order. (DoDI 3025.21), or

c. When duly-constituted federal, state or local authorities are unable or decline to provide adequate protection for Federal property or fundamental Federal functions, Federal action is authorized when necessary to protect the Federal property and functions (DoDI 3025.21).

2. Note that this authority is extremely limited.

3. 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. The military's role is to support the civilian authorities, not replace them.

## VII. DISASTER AND EMERGENCY RELIEF (NON-LAW ENFORCEMENT DSCA)

A. Key References.

1. Law. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended.

2. Directives. DoDD 3025.18 and the National Response Framework (NRF).

B. The Stafford Act is not a statutory exception to the PCA; therefore, all missions performed during a disaster relief response must comply with the restrictions of the PCA.

C. The overarching purpose of the Stafford Act is to provide an orderly and continuing means of assistance by the Federal government to state and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from a disaster. The Act provides four means by which the Federal government may become involved in a relief effort:

1. President may declare the area a **major disaster** (42 U.S.C. § 5170).

a. “Major disaster” means any natural catastrophe (including any hurricane; tornado; storm; high water; wind-driven water; tidal wave; tsunami; earthquake; volcanic eruption; landslide; mudslide; snowstorm; or drought) or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the President’s determination, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. § 5121).

b. Requires a request for the declaration from the governor.

c. State must have executed its own emergency plan and require supplemental help.

d. State certifies that it will comply with cost sharing provisions under this Act.

2. President may declare the area an **emergency** (42 U.S.C. § 5191).

a. “Emergency” means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States (42 U.S.C. § 5122).

b. Same criteria as for a major disaster, except also requires that the governor define the type and amount of Federal aid required. Total Federal assistance may not exceed 5 million dollars.

c. Operationally, there is no significant distinction between an emergency and a major disaster.

3. **President’s 10-day Emergency Authority.** President may send in DoD assets on an **emergency** basis to “preserve life and property” (42 U.S.C. § 5170b(c)).

a. “During the immediate aftermath of an incident which may ultimately qualify for assistance under this subchapter or subchapter IV-A of this chapter, the Governor of the State in which such incident occurred may request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property. If the President determines that such work is essential for the preservation of life and property, the President shall grant such requests to the extent the President determines practicable. Such emergency work may only be carried out for a period not to exceed 10 days.” (42 U.S.C. § 5170b(c)).

b. Done before any Presidential declaration, but still requires a governor’s request.

c. Lasts not more than 10 days.

d. Used to clear debris and wreckage and to temporarily restore essential public facilities and services. Very limited authority.

4. The 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 regarding a situation for which the primary responsibility for a response rests with the United States.

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

5. Types of support authorized under the Stafford Act.

a. Personnel, equipment, supplies, facilities, and managerial, technical, and advisory services in support of relief authorized under the Act (42 U.S.C. §§ 5170a(1) and 5192(a)).

b. Distribution of medicine, food, and other consumable supplies, and emergency assistance (42 U.S.C. §§ 5140a(4) and 5192(a)(7)).

c. Utilizing, lending or donating Federal equipment, supplies, facilities, personnel, and other resources to state and local governments (42 U.S.C. §§ 5170b(a)(1) and 5192(b)).

d. Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property, public health, and safety, including:

(1) Debris removal.

(2) Search and rescue; emergency medical care; emergency mass care; emergency shelter; and provision of food, water, medicine and other essential needs, including movement of supplies and persons.

(3) Clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services.

(4) Provision of temporary facilities for schools and other essential community services.

(5) Demolition of unsafe structures that endanger the public.

(6) Warning of further risks and hazards.

(7) Dissemination of public information and assistance regarding health and safety measures.

(8) Provision of technical advice to state and local governments regarding disaster management and control.

(9) Reduction of immediate threats to life, property, and public health and safety (42 U.S.C. § 5170b(a)(3)).

#### D. The Federal Response.

1. The Federal Emergency Management Agency (FEMA), which is part of the Department of Homeland Security (DHS), directs and coordinates the Federal response on behalf of the President.

2. In Homeland Security Presidential Directive (HSPD)-5, the President directed the development of a National Response Plan (superseding the Federal Response Plan) to align Federal coordinating structures, capabilities, and resources into a unified, all-disciplined, and all-hazards approach to domestic incident management. The DHS published the National Response Plan (NRP) in December, 2004 and updated the NRP on May 25, 2006. The National Response Framework subsequently superseded the NRP.

3. The **National Response Framework** (NRF) (73 Fed. Reg. 4887-4888 (Jan. 22, 2008)), effective March 22, 2008, supersedes the NRP and “is now more in keeping with its intended purpose, specifically, simplifying the language, presentation and content; clarifying its national focus; articulating the five principles of response doctrine; and methodically describing the who, what and how of emergency preparedness and response.” The NRF is a guide to how the nation conducts all-hazards response. It is built upon scalable, flexible, and adaptable coordinating structures to align key roles and responsibilities across the Nation, linking all levels of government, nongovernmental organizations, and the private sector. It is intended to capture specific authorities and best practices for managing incidents that range from the serious but purely local, to large-scale terrorist attacks or catastrophic natural disasters.

a. The NRF consists of the following components:

(1) The **core document** describes the doctrine that guides the national response, roles and responsibilities, response actions, response organizations, and planning requirements to achieve an effective national response to any incident that occurs.

(2) The **Emergency Support Function (ESF) Annexes** group Federal resources and capabilities into functional areas that are most frequently needed in a national response (e.g., Transportation, Firefighting, and Mass Care).

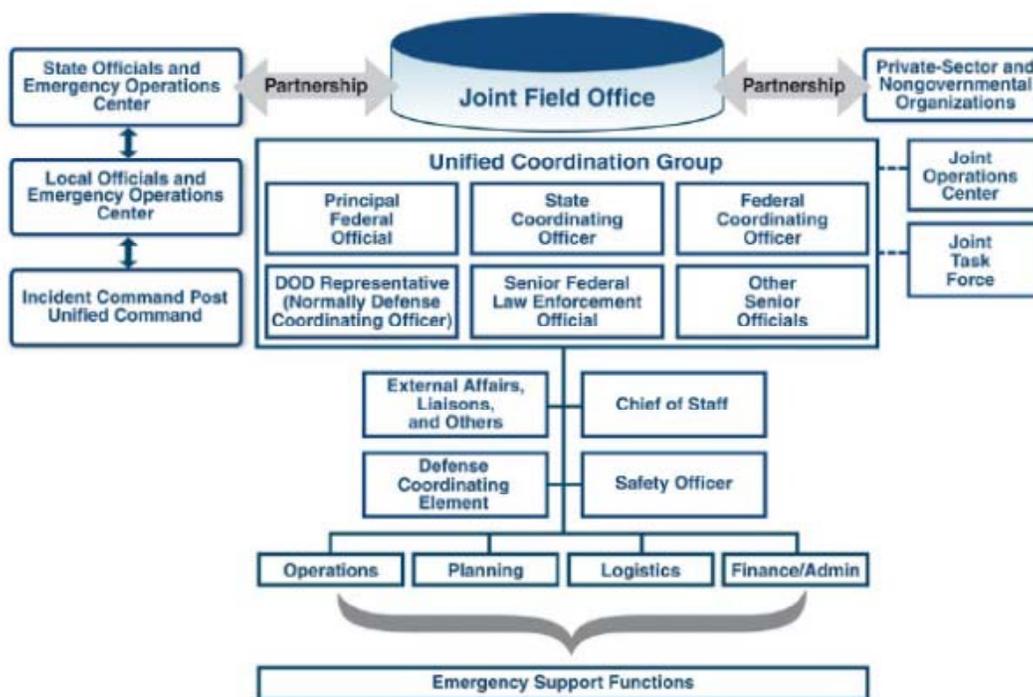
(3) The **Support Annexes** describe essential supporting aspects that are common to all incidents (e.g., Financial Management, Volunteer and Donations Management, Private-Sector coordination).

(4) The **Incident Annexes** address the unique aspects of how to respond to seven broad incident categories (e.g., Biological, Nuclear/Radiological, Cyber, and Mass Evacuation).

(5) The **Partner Guides** provide ready references describing the key roles and actions for local, tribal, State, Federal and private-sector response partners.

b. The NRF applies a functional approach that groups the capabilities of Federal departments and agencies and the American Red Cross into Emergency Support Functions (ESFs) to provide the planning, support, resources, program implementation, and emergency services that are most likely to be needed during actual or potential incidents where a coordinated Federal response is required. The NRF contains 15 ESFs for which certain Federal agencies are the coordinator, a primary agency, or a support agency or serve in two or all of the capacities. For example, the DoD/U.S. Army Corps of Engineers is the Coordinator and a Primary Agency for ESF #3 (Public Works and Engineering), and DoD is a Primary Agency for ESF #9 (Search and Rescue). DoD serves as a support agency for all 15 ESFs.

c. **Joint Field Office (JFO).** The JFO is the primary Federal incident management field structure. It is a temporary Federal facility that provides a central location for the coordination of Federal, state, tribal, and local government and private-sector and nongovernmental organizations with primary responsibility for response and recovery.



(1) The Principal Federal Official (PFO). By law and Presidential directive, the Secretary of Homeland Security is the PFO responsible for coordination of all domestic incidents requiring multiagency Federal response. The Secretary may elect to designate a single individual to serve as his or her primary representative who serves as the PFO in the field.

(2) The Federal Coordinating Officer (FCO). For Stafford Act incidents, upon the recommendation of the FEMA administrator and the Secretary of Homeland Security, the President appoints an FCO. The FCO is a senior FEMA official trained, certified, and well-experienced in emergency management, and specifically appointed to coordinate Federal support in the response to and recovery from emergencies and major disasters.

(3) Defense Coordinating Officer (DCO). The DCO is the DoD's single point of contact at the JFO. DoD has appointed ten DCOs and assigned one to each FEMA region. The DCO coordinates requests for DSCA with the exception of requests for U.S. Army Corps of Engineers support, National Guard forces operating in State Active Duty or Title 32 status (i.e., in a state, not Federal status), or, in some circumstances, DoD forces in support of the FBI. Specific responsibilities of the DCO (subject to modification based on the situation) include

processing requirements for military support, forwarding mission assignments to the appropriate military organizations through DoD-designated channels, and assigning military liaisons, as appropriate, to activated ESFs.

E. The DoD Response.

1. Regulation. DoDD 3025.18, Defense Support of Civil Authorities (DSCA), governs all planning and response by DoD components for defense support of civil authorities, with the exception of military support to law enforcement operations under DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies and contingency war plans.

2. DSCA Policy. DSCA shall include, but is not limited to, support similar to that described in para 2(c) of DoDD 3025.18, including military assistance for civilian law enforcement operations (DoDD 3025.18, para. 2(c)(5)).

3. The ASD(HD&ASA) is responsible for policy oversight (legality, cost, lethality, appropriateness, risk, readiness impact), supervises HD activities, and serves as the liaison between DoD and lead Federal agencies (LFAs).

4. The Joint Director of Military Support (JDOMS) is the ASD(HD&ASA)'s action agent. The JDOMS designates the Supported Combatant Commander (CCDR), and serves as the focal point for that CCDR and the National Guard, while coordinating and monitoring the DoD effort through the DCO. The JDOMS also deconflicts any DOMOPS mission(s) with other worldwide demands on the DoD, and also keeps the SECDEF and CJCS informed of the status of the ongoing DOMOPS mission(s).

5. Supported CCDRs. The United States Northern Command (USNORTHCOM) DSCA area of responsibility (AOR) includes air, land, and sea approaches and encompasses the continental United States, Alaska, Canada, Mexico, the Bahamas, Puerto Rico, the Virgin Islands, the Gulf of Mexico, the Straits of Florida, and the surrounding water out to approximately 500 nautical miles. The United States Pacific Command (USPACOM) DSCA AOR includes Hawaii and U.S. territories and possessions in the Pacific.

6. Supporting CCDRs. Within its geographic AOR, the United States Southern Command (USSOUTHCOM) is responsible for foreign humanitarian assistance / disaster relief (FHA/DR), which is similar to, but not the same as, DSCA. USSOUTHCOM is therefore a supporting CCDR for DSCA.

7. **Immediate Response Authority** (DoDD 3025.18, para. 4.g).

a. In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory. (DoDD 3025.18, para. 4.g).

b. Types of support authorized include:

(1) Rescue, evacuation, and emergency treatment of casualties; maintenance or restoration of emergency medical capabilities; and safeguarding the public health.

(2) Emergency restoration of essential public services (such as fire-fighting, water, communication, transportation, power and fuel).

(3) Emergency removal of debris and explosive ordnance.

(4) Recovery and disposal of the dead.

c. This type of support is provided on a cost-reimbursable basis, but assistance should not be denied because the requester is unable or unwilling to commit to reimbursement (para. 4.g.(3)).

d. **NOTE:** This is a very limited authority, and should only be invoked in bona fide emergencies. Contemporaneous coordination with higher headquarters should always occur in these scenarios, and in any other case potentially involving this type of assistance to civil authorities.

## 8. Disaster Support Involving Law Enforcement Activities.

a. The Stafford Act is not an exception to the PCA. Therefore, any support that involves direct involvement in the enforcement of civilian law must undergo the PCA analysis discussed above. Typical areas of concern include:

- (1) Directing traffic.
- (2) Guarding supply depots.
- (3) Patrolling.

b. National Guard personnel acting under state authority (either State Active Duty or under Title 32, U.S. Code) should be the organization of choice in these areas.

c. Law enforcement duties that involve military functions may be permissible (e.g., guarding a military supply depot).

## VIII. DUAL STATUS COMMAND AUTHORITIES

Unity of Command and Unity of Effort are significant concerns during a DSCA event. Disaster responses involve federal, state and local civilians, non-profit organizations and the military all responding. The military response may include both the National Guard, operating in a state capacity under the direction of their Governor, and the federal military, operating under the direction of the President. To unify the military response, federal law permits a “dual-status commander” to command both federal military in a Title 10 status and the National Guard in a Title 32 or State Active Duty status. This dual-status commander simultaneously holds two commissions, a state commission and a federal commission. The commander can then direct both state and federal forces to coordinate the military response and provide a unity of effort.

Dual-status commanders operate two chains of command simultaneously. The commander receives orders from both superior and separate Federal and state chains of command. These two distinct, separate chains of command flow through different sovereigns that recognize and respect a dual-status commander’s duty to exercise these two separate authorities in a mutually exclusive manner. As such, a dual-status commander typically establishes his or her own subordinate Federal and state chains of command, having both a Title 10 staff and Title 32 or State Active Duty staff. The subordinate officers operate in only one status, either state or federal.

A. **National Guard Dual-Status Commander.** Title 32 U.S.C. § 325(a)(2), however, provides limited authority for a National Guard officer to serve simultaneously in both state and Federal statuses. The dual-status commander can concurrently command both Federal (Title 10) and state (Title 32, State Active Duty) forces. This dual status requires the authority of the President (currently delegated to the SECDEF) and the consent of the officer’s Governor to serve in both duty statuses. The National Guard dual-status command authority has been used during recent **National Special Security Events (NSSEs)**, Superstorm Sandy, the 2014 Superbowl in New Jersey and elsewhere. An NSSE is a highly visible, well-attended event that, if attacked by terrorists, would have significant impact on our country because of physical and psychological damage. Examples include the G8 Summit, the Republican and Democratic National Conventions, and the Super Bowl.

B. **Active Component Dual-Status Commander.** Pursuant to 32 U.S.C. § 315, the Secretaries of the Army or Air Force may detail regular officers to duty with the National Guard, and with the permission of the President, the detailed officer may accept a commission in the National Guard without vacating his or her regular appointment. The state or territory would have to commission the officer in its National Guard for him or her to command its National Guard forces serving under state authority. State law will dictate the requirements and procedures for such appointment and would typically require the Governor’s consent.

## IX. COUNTERDRUG SUPPORT

### A. Key References.

1. Law.
  - a. 10 U.S.C. § 124.
  - b. 32 U.S.C. § 112.

- c. Section 1004, FY-91 NDAA, as amended by FY-02 NDAA.
  - d. Section 1031, FY-97 NDAA.
  - e. Section 1033, FY-98 NDAA.
2. Directives.
    - a. CJCSI 3710.01B, 26 Jan. 2007.
    - b. NGR 500-2/ANGI 10-801.
- B. Detection and Monitoring (D&M).
1. Pursuant to 10 U.S.C. § 124, DoD is the lead Federal agency for D&M of aerial and maritime transit of illegal drugs into the United States. Accordingly, D&M is a DoD mission.
  2. Although it is a DoD mission, D&M is to be carried out in support of Federal, state, and local law enforcement authorities.
  3. Note that the statute does not extend to D&M missions covering land transit (e.g., the Mexican border).
  4. 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.
  5. D&M missions involve airborne (AWACs, aerostats), seaborne (primarily U.S. Navy vessels), and land-based radar (to include Remote Over The Horizon Radar (ROTHR)) sites.
  6. Note: this mission is not covered by CJCSI 3710.01B.
- C. National Guard (NG).
1. Pursuant to 32 U.S.C. § 112, SECDEF may make Federal funding available for NG drug interdiction and counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses.
  2. The state must prepare a drug interdiction and counterdrug activities plan. DoD's Office of Drug Enforcement Policy and Support (DEP&S) reviews each state's implementation plan and disburses funds.
  3. It is important to note that although the NG is performing counterdrug support operations using Federal funds and under Federal guidance, it remains a state militia force and is not to be considered a Federal force for purposes of the PCA.
  4. Although the NG is not subject to the restrictions of the PCA while not in Federal status, the National Guard Bureau (NGB) has imposed a number of policy restrictions on counterdrug operations. *See* NGR 500-2 for more information.
- D. Additional Support to Counterdrug (CD) Agencies.
1. General. In addition to the authorities contained in 10 U.S.C. §§ 371-377 (discussed above), Congress has given DoD additional authorities to support Federal, state, local, and foreign entities that have counterdrug responsibilities. Congress has not chosen to codify these authorities, however, so it is necessary to refer to the Public Laws instead. Many of them are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.
  2. Section 1004 (Appendix B).
    - a. Section 1004 is the primary authority for counterdrug operations. The statute permits broad support to the following law enforcement agencies that have counterdrug responsibilities:
      - (1) Federal, state, and local.
      - (2) Foreign, when requested by a Federal counterdrug agency (typically, the Drug Enforcement Agency or member of the State Department Country Team that has counterdrug responsibilities within the country).
    - b. Types of support (*see* CJCSI 3710.01B):
      - (1) Equipment maintenance.
      - (2) Transportation of personnel (U.S. & foreign), equipment and supplies CONUS/OCONUS.

- (3) Establishment of bases of operations CONUS/OCONUS.
- (4) Counterdrug-related training of law enforcement personnel, including associated support and training expenses.
- (5) Detection and monitoring of air, sea and surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States.
- (6) Engineer support (e.g., construction of roads, fences and lights) along the U.S. border.
- (7) Command, control, communication, and intelligence and network support.
- (8) Linguist and intelligence analyst services.
- (9) Aerial and ground reconnaissance.
- (10) Diver support.
- (11) Tunnel detection support.
- (12) Use of military vessels for law enforcement agencies operating bases by Coast Guard personnel.
- (13) Technology demonstrations.

3. Training of law enforcement personnel.

a. Geographic Combatant Commanders (GCCs) may approve counterdrug-related training of foreign law enforcement personnel requiring no more than 50 theater-assigned personnel for no more than 45 days with host nation (HN) and Country Team approval and notification.

b. GCCs may approve counterdrug-related technical and administrative support team deployments requiring no more than 25 personnel for no more than 179 days with HN and Country Team approval and notification.

4. Approval Authorities. *See* CJCSI 3710.01B.

**X. MISCELLANEOUS SUPPORT**

A. Sensitive support – DoDD S-5210.36.

B. Law Enforcement Detachments (LEDETs).

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 LEDETs.

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, law enforcement duties should be left to Coast Guard personnel. Military members should offer necessary support.

C. Emergencies Involving Chemical or Biological Weapons. The Secretary of Defense, upon request of the Attorney General, may provide assistance in support of Department of Justice activities during an emergency situation involving a biological or chemical weapon of mass destruction. 10 U.S.C. § 382.

1. Department of Defense Rapid Response Team. The SECDEF shall develop and maintain at least one domestic terrorism rapid response team composed of members of the Armed Forces and employees of the DoD who are capable of aiding Federal, state, and local officials in the detection, neutralization, containment, dismantlement, and disposal of weapons of mass destruction containing chemical, biological, radiological, nuclear, and high-yield explosives (CBRNE). 50 U.S.C. § 2314(a) (LEXIS 2006). The U.S. Marine Corps Chemical Biological Incident Response Force (CBIRF) has the mission to, when directed, forward-deploy and /or respond to a credible threat of a CBRNE incident in order to assist local, state, or Federal agencies and Combatant Commanders in the conduct of

consequence management operations. CBIRF accomplishes this mission by providing capabilities for agent detection and identification; casualty search, rescue, and personnel decontamination; and emergency medical care and stabilization of contaminated personnel.

2. National Guard Weapons of Mass Destruction Civil Support Teams (WMD-CSTs). 10 U.S.C. § 12310(c). Each team consists of twenty-two highly skilled, full-time Army and Air National Guard members who are state controlled, Federally resourced, trained, and exercised, employing Federally-approved response doctrine. In 2002, Congress required the establishment of fifty-five teams, providing at least one team is established in each state (two in California) and territory (U.S. Virgin Islands, Puerto Rico, Guam) and Washington, D.C. Their missions primarily fall under the command and control of state or territory officials; however, if the teams are Federalized, they would likely fall under the command and control of Joint Task Force, Civil Support (JTF-CS).

D. Miscellaneous Exceptions. DoDI 3025.21 contains a list of statutes that provide 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 or foreign officials, or involving nuclear materials.

## **X. CONCLUSION**

The Military will always be called to defend the Homeland from attack. It must also continue to be prepared to assist civil authorities in a variety of missions from disaster relief to suppressing insurrections. The law and guidance pertaining to the use of DoD for domestic operations is dynamic and continues to evolve. The terrorist attacks of September 11, 2001, and recent significant disasters such as Hurricane Katrina, the 2010 Gulf of Mexico oil spill, and Superstorm Sandy have resulted in (or will likely result in) changes in Federal response law, philosophy, guidance, structure and capabilities. Consequently, it is imperative that judge advocates practicing domestic operations stay abreast of these changes to ensure that U.S. military involvement in such operations complies with all applicable laws, regulations, and DoD guidance.

**APPENDIX A**

THE DEPUTY SECRETARY OF DEFENSE WASHINGTON D.C. 20301-1000

29 JUN 1996

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
COMMANDERS-IN-CHIEF OF THE UNIFIED COMBATANT COMMANDS  
ASSISTANT SECRETARIES OF DEFENSE  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR OF ADMINISTRATION AND MANAGEMENT  
CHIEF, NATIONAL GUARD BUREAU

SUBJECT: DoD Training Support to U.S. Civilian Law Enforcement Agencies

This directive-type memorandum provides the DoD policy for providing advanced military training to U.S. civilian law enforcement agencies.

It is DoD policy that no advanced military training will be provided to U.S. civilian law enforcement agency (CLEA) personnel, except as noted below. "Advanced military training," in the context of this policy, 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. "Advanced military training" includes advanced marksmanship (including sniper training), military operations in urban terrain (MOUT), advanced MOUT, close quarters battle/close quarters combat (CQB/CQC), and similar specialized training. It does not include basic military skills such as basic marksmanship, patrolling, mission planning, medical, and survival skills.

As a single general exception to this policy, the U.S. Army Military Police School is authorized to continue training CLEA personnel in the Counterdrug Special Reaction Team Course, the Counterdrug Tactical Police Operations Course, and the Counterdrug Marksman/Observer Course. Additionally, on an exceptional basis, the Commander-in-Chief, U.S. Special Operations Command (USCINCSOC) may approve such training by special operations forces. In such cases, USCINCSOC will inform the Executive Secretary to the Secretary of Defense of the training support provided. Similarly, the U.S. Army MP School will continue to report training performed in accordance with existing procedures.

Those portions of applicable DoD directives and instructions relating only to the procedures for coordination and approval of CLEA requests for DoD support are not affected by this memorandum. Those portions of such directives that address the substance of training that may be provided to CLEAs will be revised to reflect this change in policy within 90 days.

The Under Secretary of Defense for Policy will notify civilian law enforcement agencies through appropriate means of this change in policy

/s/ JOHN P. WHITE

APPENDIX B

NATIONAL DEFENSE AUTHORIZATION ACT FOR FY2002

107 PUB. L. 107; 115 Stat. 1012; 2001 Enacted S. 1438; 107 Enacted S. 1438

Sec. 1021. EXTENSION AND RESTATEMENT OF AUTHORITY TO PROVIDE DEPARTMENT OF DEFENSE SUPPORT FOR COUNTER-DRUG ACTIVITIES OF OTHER GOVERNMENTAL AGENCIES.

**Section 1004 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 10 U.S.C. 374 note) is amended to read as follows:**

Sec. 1004. ADDITIONAL SUPPORT FOR COUNTER-DRUG ACTIVITIES.

(a) Support to Other Agencies.--During fiscal years 2002 through 2006, the Secretary of Defense may provide support for the counter-drug activities of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency for any of the purposes set forth in subsection (b) if such support is requested—

(1) by the official who has responsibility for the counter-drug activities of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government;

(2) by the appropriate official of a State or local government, in the case of support for State or local law enforcement agencies; or

(3) by an appropriate official of a department or agency of the Federal Government that has counter-drug responsibilities, in the case of support for foreign law enforcement agencies.

(b) Types of Support.--The purposes for which the Secretary of Defense may provide support under subsection (a) are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State or local government by the Department of Defense for the purposes of—

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department of Defense.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in paragraph (1) for the purpose of—

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department of Defense.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counter-drug activities within or outside the United States.

(4) The establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating counter-drug activities of the Department of Defense or any Federal, State, or local law enforcement agency within or outside the United States or counter-drug activities of a foreign law enforcement agency outside the United States.

(5) Counter-drug related training of law enforcement personnel of the Federal Government, of State and local governments, and of foreign countries, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

- (6) The detection, monitoring, and communication of the movement of—
- (A) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and
  - (B) surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.
- (7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.
- (8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.
- (9) The provision of linguist and intelligence analysis services.
- (10) Aerial and ground reconnaissance.
- (c) **Limitation on Counter-Drug Requirements.**--The Secretary of Defense may not limit the requirements for which support may be provided under subsection (a) only to critical, emergent, or unanticipated requirements.
- (d) **Contract Authority.**--In carrying out subsection (a), the Secretary of Defense may acquire services or equipment by contract for support provided under that subsection if the Department of Defense would normally acquire such services or equipment by contract for the purpose of conducting a similar activity for the Department of Defense.
- (e) **Limited Waiver of Prohibition.**--Notwithstanding section 376 of title 10, United States Code, the Secretary of Defense may provide support pursuant to subsection (a) in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.
- (f) **Conduct of Training or Operation To Aid Civilian Agencies.**--In providing support pursuant to subsection (a), the Secretary of Defense may plan and execute otherwise valid military training or operations (including training exercises undertaken pursuant to section 1206(a) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 103 Stat. 1564)) for the purpose of aiding civilian law enforcement agencies.
- (g) **Relationship to Other Laws.** —
- (1) The authority provided in this section for the support of counter-drug activities by the Department of Defense is in addition to, and except as provided in paragraph (2), not subject to the requirements of chapter 18 of title 10, United States Code.
  - (2) Support under this section shall be subject to the provisions of section 375 and, except as provided in subsection (e), section 376 of title 10, United States Code.
- (h) **Congressional Notification of Facilities Projects.** —
- (1) When a decision is made to carry out a military construction project described in paragraph (2), the Secretary of Defense shall submit to the congressional defense committees written notice of the decision, including the justification for the project and the estimated cost of the project. The project may be commenced only after the end of the 21-day period beginning on the date on which the written notice is received by Congress.
  - (2) Paragraph (1) applies to an unspecified minor military construction project that—
    - (A) is intended for the modification or repair of a Department of Defense facility for the purpose set forth in subsection (b)(4); and
    - (B) has an estimated cost of more than \$ 500,000.

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